No. _____

In the
Supreme Court of the United States

CeCee C. Kane and Joseph P. Kane,
Petitioners,

v.

Sulzer Settlement Trust,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether, upon motion by an aggrieved class member, the District Court is required to review the legal conclusions of a "Special Master" which operate to exclude otherwise deserving class members from the settlement created for their benefit?

PARTIES TO PROCEEDING

Petitioners Kane are members of the certified class in In Re: Sulzer Orthopedics and Knee Prosthesis Products Liability Litigation (United States District Court, Northern District of Ohio, Eastern Division, Case No. 1:01-CV-0900, who have been excluded from the Sulzer class action settlement by order of the "Special Master" without judicial review.

Respondent is the Sulzer Settlement Trust which was created to administer the settlement between class members and Sulzer Orthopedics, Inc., in a case arising out of allegedly defective hip replacement components.

In addition to these parties, the following were parties to the proceeding below:

Plaintiffs: Shirley Butler and Linda Mediate, both individual members of the certified class were excluded from participating in the class action settlement agreement by order of the "Special Master" without judicial review.

Defendants: Sulzer Orthopedics, Inc., is a publicly owned cooperation. In May of 2003, Zimmer Holdings, Inc., which is a publicly owned company traded on the New York Stock Exchange acquired CenterPulse, Inc., whose subsidiaries include CenterPulse Orthopedics, Inc., formerly known as Sulzer Orthopedics, Inc.

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PETITION FOR WRIT OF CERTIORARI

Petitioners CeCee and Joseph Kane respectfully petition for a Writ of Certiorari to review the Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit, filed on February 22, 2005 (App. 1a) and May 7, 2005 (App. 2a).

OPINIONS BELOW

The judgment of the United States Court of Appeals for the Sixth Circuit, filed on February 22, 2005, is published at 398 F. 3d. 782 (6th Cir. 2005) and attached hereto (App. 1a.). The Order of the United States Court of Appeals for the Sixth Circuit, filed May 7, 2005, is also attached hereto (App. 2a). The underlying decision of the United States District Court for the Northern District of Ohio, Eastern Division, filed on February 6, 2004, may be accessed at that Court's Pacer site at https://ecf.ohnd.uscourts.gov/cgi-bin.pl. The case number is 1:01-CV-0900. The docket document number is 1714.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit issued its Order denying Rehearing En Banc on May 7, 2004 (App. 2a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT FEDERAL RULES OF CIVIL PROCEDURE

Fed.R.Civ.P. 53(e)(4)[1] reads as follows: "**Stipulation as to Findings**": The effect of a masters report is the same whether or not the parties have consented to a reference; but, when the parties stipulate that a masters' findings of fact shall be final, *only questions of law arising upon the report shall thereafter be considered.* (emphasis added)[2]. Also Fed.R.Civ.P. 23 is relevant to the extent that it imposes upon the District Court an equitable and fiduciary duty to protect class members.

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[1] Rule 53 was revised effective December 1, 2003. Unless otherwise provided, citations are to the older versions (App. 2a).

[2] Section (g)(4) of the current version of Rule 53, in effect since December 1, 2003, reads as follows: "**Legal Conclusions**: The court *must* decide de novo all objections to conclusions of law made or recommended by a master." (emphasis added)

STATEMENT OF THE CASE

INTRODUCTION

Petitioners Kane respectfully petition this Court for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Sixth Circuit, filed on February 22, 2005 (398 F.3d 782 (6th Cir. 2005) (App. 1a) and that Court's later Order denying the Kane Petition for Rehearing En Banc, filed on May 7, 2005. These decisions involve an issue of exceptional importance in the future administration of class action settlement agreements nationwide: the reviewability of legal determinations on ultimate issues by decision makers specifically designated as "Special Masters" in class action settlement agreement but without reference to Rule 53. The above re-formatted decisions of the Sixth Circuit are in direct conflict with *Turner v. Orr,* 722 F.2d 661 (11th Cir. 1984), as discussed herein.

Petitioners further contend that the Sixth Circuit's decision of February 22, 2005 erroneously affirmed the District Court's total abdication of its equitable and fiduciary duty to protect deserving class members from arbitrary exclusion from class action settlemems under Fed.R.Civ.P. 23. Such affirmance is in direct conflict with the decisions of multiple circuits holding that the determination of whether to allow participation of late claimants in a class action is essentially an equitable decision within the discretion of the Court. *In re: Crazy Eddie Sec. Litig.,* 906 F. Supp. 840, 843 (E.D.N.Y. 1995)(citing *Zients v. LaMorte,* 459 F.2d 628, 629-30 (2nd Cir. 1972). See, also, *In re: Orthopedic Bone Screw Products Liability Litigation,* 246 F. 3d 215, 316-17 (3rd Cir. 2001). The Sixth Circuit's extraordinary decision to allow the District Court to avoid its equitable and moral

responsibility to protect deserving class members by refusing to interpret and enforce the terms of the Sulzer Class Action Settlement Agreement (CASA)[3] despite the explicit "ability" to do so granted at CASA § 9.1 is legally and morally indefensible.

FACTS

Petitioner CeCee C. Kane was implanted with defective Sulzer products on two separate occasions involving the same hip over the course of two years. Both products failed. She has undergone eight surgeries and remains confined to a wheelchair. Prior to adoption of the CASA, Sulzer paid Mrs. Kane more than $30,000.00 in recognition of their culpability and her severe injuries. Mrs. Kane opted into the CASA, and the claims administrator was informed of Sulzer's prior payments to Mrs. Kane within weeks of the approval of the CASA pursuant to Claims Administrator's Procedural (CAP) rule 7.2 (CAP 7.2)[4]. Mrs. Kane missed an Orange Form (i.e., registration) deadline due to circumstances beyond her control, when physicians failed to complete lengthy claim forms and declarations prior to the deadline. All of her forms, however, were provided to the claims administrator *months* before any action would have been taken on her claim. The claims administrator summarily dismissed her claim. The Special Master affirmed (App. 3a). Mrs. Kane, relying on Rule 53, then attempted to appeal to the District Court (PACER, N. Dist. Ohio, case no.: 1:01-CV-

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[3] The CASA can be viewed in its entirety at the web page for the Sulzer Settlement Trust at http://sulzerimplantsettlement.com/classactionsettlement.htm.

[4] The Claims Administrator's Procedural rules (CAP) can also be accessed at the Sulzer Settlement Trust at https://sulzerimplantsettlement.com

0900, doc. no. 1179 and 1180). The District Court refused to review the Special Master Determination claiming a lack of jurisdiction. In essence, the District Court ruled that it had no jurisdiction to review the legal conclusions of "Special Master" because the CASA document contained no provision authorizing such review (PACER, N. Dist. Ohio, no. 1:01-CV-0900, docket. no.: 1714)[5]. In its decision of February 22, 2005, the United States District Court for the Sixth Circuit affirmed (App. 1a). In its Order of May 7, 2005, the District Court denied the Kane Petition for Rehearing En Banc (App. 2a).

REASONS FOR GRANTING THE WRIT

Petitioners Kane direct the Court's attention to *Turner v. Orr*, 722 F.2d 661 (11th Cir. 1984), a case that is directly on point and directly in conflict with the Sixth Circuit's decision of February 22, 2005. In *Turner*, the District Court tried unsuccessfully to abdicate its equitable responsibility to protect class members by characterizing a "special master" as a quasi-arbitrator not subject to judicial review, which is precisely what occurred in this case. The Eleventh Circuit refused to allow the District Court to punt. It held that the name "Special Master" was a legal term under Rule 53, and that if a class action decision maker is repeatedly referred to as a "Special Master" in the agreement and elsewhere, he is a Rule 53 Special Master. A Rule 53 Special Master's legal decisions are *always* advisory and subject to District Court review. *Turner*, 722 F.2d at 664-665. (emphasis added); see, also, *United States v. Microsoft Corp.*, 147 F.3d 935, 955 (D.C. Cir. 1998); *Baker Industries, Inc. v. Cerberus Limited*

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[5] As noted above, the District Court opinion can be accessed at https://ecf.ohno.uscourts.gov/cgi-bin.pl.

Cravath, 764 F.2d 204 *. (3d Cir. 1985), dissent, J. Higginbotham. Here, the CASA refers repeatedly to a "Special Master". There is no mention whatsoever of arbitration or waiver of Rule 53 judicial review.

There is no question that the "Special Master" in this case was a *Rule 53 Special Master* under *Turner*, and that the District Court had an obligation under Rule 53 to review his legal determinations. Petitioners Kane have never "attacked" the terms of the CASA or requested that the District Court or this Court "alter" the terms of the CASA. On the contrary, the Kanes merely requested that the District Court interpret the CASA as it was specifically authorized to do. See, CASA § 9.1. The District Court *misinterpreted* the CASA, first, by mischaracterizing the Special Master as some kind of arbitrator, and second, by misinterpreting the phrase "final and binding" as precluding judicial review of legal conclusions. In reality, the phrase merely terminates the administrative process and makes a Special Master Determination ripe for appeal to the District Court.

Interpretation is not alteration or attack. When a District Court engages in the interpretation of a class action settlement agreement, it must construe the agreement *against* those who seek to restrict class members from pursuing individual claims. See, *In re: Diet Drugs Prod. Liab. Litig.*, 369 F.3d 293, 308 (3d Cir 2004). The District Court had the ability (i.e., jurisdiction) to *interpret/enforce* the CASA and the responsibility to do it in a manner consistent with the *equitable* nature of the proceeding. The District Court, however, did nothing, and the Sixth Circuit affirmed.

The phrase "final and binding" (CASA § 4.6(g)), standing alone, is not enough to waive appellate rights. Without language establishing an *express* waiver of appellant's rights, there is no waiver. See, *In re: Dept. Energy Stripper Well Exemption Litig.*, 853 F.2d 1579, 1582

(Temp. Emer. Ct. App. 1988) (emphasis added). The intention to waive appellate rights must be "clear and unequivocal". Furthermore, there is authority for the proposition that the right of appeal of a Rule 53 Special Master's legal conclusions cannot be waived. See, *Polin v. Dun and Bradstreet*, 634 F.2d 1319. 1321, Note 4, (10th Cir. 1980); *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 931 (10th Cir. 2001). Common sense dictates that the final and binding language in this instance meant that the claims administration process had been exhausted and the issue was ripe for appeal to the District Court.

As its only legal authority for affirming the decision of the District Court in this case, the Sixth Circuit cited a single First Circuit case involving a settlement agreement between two business entities. *Brown v. Gillette*, 723 F.2d 192 (1st Cir. 1983). In *Brown*, the parties agreed that an arbitrator would govern the administration of the agreement with the proviso that the District Court would decide certain claims: "The parties agree that the determinations of the [district] Court on such claims shall be final and binding and hereby waive any and all rights of appeal with respect to such determinations. *Brown*, 723 F.2d at 192-193. The First Circuit correctly found that this language constituted a waiver of judicial review by the Court of Appeals. This case, however, involved a business contract *at law* where the parties agreed to let an *Article III* judge decide certain claims and *expressly and explicitly agreed to waive circuit level review of the judge's decisions*. The obvious implication in *Brown* is that the *arbitrator's* decisions *were* reviewable.

In the instant *equitable* proceeding, the CASA contains no mention of arbitration or arbitrators, the District Court was not involved at the administrative level, and there is no reference whatsoever to any waiver of the right to judicial review. *Brown* in no way supports the use of a bogus

implied waiver of judicial review to exclude otherwise eligible class members in the context of an equitable class action.

CASA § 9.1 specifically empowers the District Court to interpret and enforce the terms of the CASA. The only *altering* of the terms of the CASA occurred when the District Court approved and adopted CAP 30(8) which belatedly added waiver language in March of 2003, almost two years after the CASA was approved. No class member ever assented to this post-agreement waiver of appellate rights.

Upon motion or objection, the District Court has an obligation to review the *legal* conclusions of a Special Master *de novo*. *U.S. Energy Corp. v. Nukem, Inc.*, 400 F.3d 822, 830 (10th Cir. 2005). The failure to do so constitutes a gross abdication of the equitable and moral responsibility of the judiciary to protect deserving but late arriving class members who are akin to "wards of the court". See, *Zients*, 459 F.2d at 630. In essence, the District Court excluded a permanently injured class member and scores of others similarly situated, from a class action created for *their* benefit without judicial review. Mrs. Kane's exclusion should have been reviewed under the "excusable neglect" standard set forth in *Pioneer Inv. Servs. Co. v. Brunswick Assoc. Ltd. P'ship*, 507 U.S. 380 (1992) and/or the substantial compliance standard set forth in *In re: Eagle-Picher Industries, Inc.*, 285 F.3d 522 (6th Cir. 2002)[6]. Under either standard, Mrs. Kane would have been reinstated and compensated as Sulzer and the claims administrator had always anticipated.

Mrs. Kane would ask this Court to consider the following passage which concludes *Turner*:

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[6] Under CASA § 15.11, Delaware law governs the settlement agreement. Substantial compliance is recognized and applied in Delaware under similar circumstances. See, *Mendich v. Hunt International Resources, Inc.*, 1981 WL 7629 (Del. Ch. 1981).

> Finally, the district court failed to give sufficient weight to the policy implicit in Fed.R.Civ.P. 23, which governs class actions, that places a special responsibility on the district court to protect potential class members and ensure that they receive the due process to which they are entitled. See, e.g., *In Re Nissan Motor Corp. Antitrust Litigation*, 552 F.2d 1088, 1098 (5th Cir. 1997) (appellate review necessary to assure rights of absentee class members are not "inundated in the wake of district court's brisk supervision"). Although Rule 23 does not mean that the parties were prohibited from providing in a consent judgment for the arbitrator type arrangement that PMC urges was intended in this case, it does mean that ***in cases of doubt about the clear meaning of such an agreement, and particularly the agreement uses the term "special master", the courts should construe the judgment to provide for the kind of appeal allowed by Rule 53.***

Turner, 722 F.2d at 665-666 (emphasis added).

CONCLUSION

Petitioners Kane respectfully request that the Court grant their Petition for a Writ of Certiorari to address an issue of exceptional importance in the future administration of class actions nationwide: the reviewability of *legal conclusions* made by a "Special Master" which result in the wrongful exclusion of otherwise eligible class members. This

Court has an opportunity to make sure that the drafters of future class action settlement agreements will not use the legal term "Special Master" to describe trust administrators with *unreviewable* legal decision-making powers, because it is inherently contradictory and confusing under Rule 53, and results in the forfeiture of Rule 53 judicial review without notice prior to opting in to the action. Mrs. Kane and her husband, Joseph, respectfully request that this Court reverse the decision of the Sixth Circuit and remand this case to the United States District Court for the Northern District of Ohio, Eastern Division, for review of the subject Special Master's Determination (App. 3a), and the scores of similar Determinations excluding other deserving class members, in the context of *Pioneer*, *Eagle-Picher*, Delaware law, and the overall equitable nature of the underlying proceeding.

Respectfully submitted,

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Counsel for Petitioners Kane

Dated: August 31, 2005

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 03-4325; 03-4518; 03-4519; 04-3293; 04-3360; 04-3361

FILED
FEB 22 2005
LEONARD GREEN, Clerk

In re: SULZER ORTHOPEDICS AND KNEE
PROSTHESIS PRODUCTS LIABILITY LITIGATION,

CERTIFIED CLASS,
Plaintiffs,
LINDA MEDIATE (03-4325/4518; 04-3360);
CECEE C. KANE and JOSEPH P. KANE
(034519; 04-3293(3361),
Plaintiffs - Appellants,
v.

SULZER MEDICAL et al.,
Defendants - Appellees,
SULZER SETTLEMENT TRUST,
Appellee,

Before: MARTIN, COLE, and GIBBONS, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Northern District of Ohio at Cleveland.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s Leonard Green
Leonard Green, Clerk

Recommended for full-text publication
Pursuant to Sixth Circuit Rule 206

File Name: 05a0084p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 03-4325/4518/4519; 04-3293/3360/3361

In re: SULZER ORTHOPEDICS KNEE PROSTHESIS PRODUCTS LIABILITY LITIGATION.	)
CERTIFIED CLASS, Plaintiffs,	)
LINDA MEDIATE (03-4325/4518; 04-3360); CECEE C. KANE and JOSEPH P. KANE (03-4519; 04-3293/3361) Plaintiffs-Appellants,	)
v.	)
SULZER MEDICA et al., Defendants-Appellees,	)
SULZER SETTLEMENT TRUST, Appellee,	)

Appeal from the United States District Court
for the Northern District of Ohio at Cleveland.
No. 01-09000- Kathleen McDonald O'Malley, District Judge.

Argued: September 23, 2004

Decided and Filed: February 22, 2005

Before: MARTIN, COLE, and GIBBONS, Circuit Judges.

COUNSEL

ARGUED: Bonnie I. Robin-Vergeer, PUBLIC CITIZEN LITIGATION GROUP, Washington, D.C., for Appellants. Irene C. Keyse-Walker, TUCKER, ELLIS & WEST Cleveland, Ohio, for Appellees. **ON BRIEF**: Bonnie I. Robin-Vergoer, Brian Wolfman, PUBLIC CITIZEN LITIGATION GROUP, Washington, P.C., Thomas J, Brandi, LAW OFFICES OF THOMAS J. BRANDI, San Francisco, California, Kevin P. Mahoney, ROBERTS & MAHONEY, Spokane, Washington, for Appellants. Irene C. Keyse-Walker, TUCKER, ELLIS & WEST Cleveland, Ohio, David W. Brooks, Harvey L. Kaplan, SHOOK, HARDY & BACON, Kansas City, Missouri, Cullen D. Seltzer, BROWN GREER. Richmond, Virginia, for Appellees.

Nos. 03-4325/4518/4519;
04—3293/3360/3361

In re Sulzer Orthopedics and
Knee Prosthesis
Products Liability Litigation

OPINION

BOYCE F. MARTIN, JR., Circuit Judge. Linda Mediate, Cecee Kane, and Joseph P. Kane, plaintiffs in this consolidated appeal, attempted to challenge in the district court findings of the Special Master regarding their entitlement to benefits resulting from the multi-district litigation class action Settlement Agreement. The district court refused jurisdiction over their challenge and we AFFIRM that judgment,

The Settlement Agreement between the parties provides the following: U) a settlement plaintiff may apply for settlement benefits by submitting the required forms to the Claims Administrator; (2) the Claims Administrator will then make a determination regarding the plaintiff's entitlement to benefits; (3) if the plaintiff disagrees with the Claims Administrator's determination, he may file an appeal with the court-appointed Special Master; and (4) [a]ny determination by the special master . . . shall constitute a final and binding determination."

Plaintiffs, Who were duly entitled to benefits under the Settlement Agreement, were disqualified from receiving such benefits because their attorneys failed to file their forms

in a timely manner with the Claims Administrator. Plaintiffs then challenged their disqualification, proceeding through the steps outlined above. The Special Master ultimately denied their challenge, and plaintiffs then sought to appeal that decision to the district court.

The district court properly refused to hear their challenge, explaining that the Settlement Agreement does not provide for an additional appeal of the special master's determination. Plaintiffs' challenge attacks the terms of the Settlement Agreement, and neither this Court nor the district court has authority to entertain such an attack. *See Brown v. County of Genesee*, 872 F.2d 169, 173 (6th Cir. 1989) (internal quotations omitted) ("[A] court must enforce the settlement as agreed to by the parties and is not permitted to alter the terms of the agreement"). We adopt the reasoning and conclusion of the district court, and AFFIRM its judgment.

Nos, 03-451 9104-3293/3361

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
MAY 07 2005
LEONARD GREEN, Clerk

IN RE: SULZER ORTHOPEDICS AND KNEE PROSTHESIS
PRODUCTS LIABILITY LITIGATION,

CERTIFIED CLASS,
Plaintiffs,

CECEE C. KANE. ET AL.,
Plaintiffs-Appellants,

v. **ORDER**

SULZER MEDICA, ET AL.,
Defendants-Appellees,
)
SULZER SETTLEMENT TRUST,
Appellee.

BEFORE: MARTIN, COLE, and GIBBONS, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/S LEONARD GREEN
Leonard Green, Clerk,

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE: SULZER HIP	
PROSTHESIS	) Civil Action No.: O1-CV4000
AND KNEE PROSTHESIS	)
PRODUCT	) ALL CASES
LIABILITY LITIGATION	)
	) (MDL No. 1401)
This document relates to:	)
Cecee C. Kane /	) Judge Kathleen M. O'Malley
Claim Number: 537588715	)
Joseph Kane	)
(Claim Number. 533407542	)

NOTICE OF SPECIAL MASTER DETERMINATION

Class Members CeCee C. Kane and her spouse, Joseph Kane, by and through their attorney Kevin P. Mahoney, Esq. of the Law Firm Roberts & Mahoney ("Appellants"), appealed the decision of the Claims Administrator ("Appellee") in rendering Final Determinations dated May 19, 2003 and June 16, 2003 on Appellants' claims for benefits from the Sulzer Settlement Trust.

Appellants appealed the decision of the Appellee, and contend that Appellee erred in his decision to award a net benefit amount of Zero Dollars ($0.00) to Appellants.

The factual findings of this matter are as follows:

1. Appellants submitted an untimely Orange Form seeking APRS benefits, an untimely Red Form seeking Uninsured benefits, and an untimely Yellow Form seeking Derivative Claimant benefits on December 26, 2002.

2. On February 4, 2003 and March 7, 2003 Appellee did issue Preliminary Determinations that Appellants were not eligible for Settlement benefits because their claims had not been submitted before the applicable deadline in accordance with the requirements of the Settlement Agreement.

3. On April 19, 2003 Appellee considered end denied Appellants request for an extension of the APRS filing deadline under the requirements of CAP 29 because Appellants had not presented facts sufficient to warrant an extension of the filing deadline.

4. On May 19, 2003 and June 16, 2003 Appellee issued Final Determinations that Appellants were not eligible for Settlement benefits because they did not file their claims before the deadline.

IN RE: SULZER HIP PROSTHESIS
AND KNEE PROSTHESIS PRODUCT
LIABILITY LITIGATION
Notice of Special Master Determination
CeCee C. Kane / Claim Number: 537588715
Joseph Kane / Claim Number: 533407342

After a thorough review of the appeal submitted by the Appellants and the response submitted by the Appellee, the Special Master finds as follows:

Appellee, Claims Administrator, did not abuse his discretion in denying the APRS and Uninsured APR claims of Appellant Cecee Kane and the Derivative Claimant claim of Joseph Kane, separately filed and consolidated for this opinion.

The eligibility of the Derivative Claimant is dependent on that of the associated APR.

Appellant does not dispute the fact that the claim was 51 days late, but seeks to excuse the late filing on her inability to procure the necessary medical records.

The Settlement Agreement (the "Agreement) anticipated this problem and allows for the timely filing of claim forms and later providing supplemental information to complete the claim.

The Agreement entered into by Class Counsel and approved by the Federal District Court imposes certain duties

on the Appellee. The Claims Administrator is charged with the obligation to apply the plain and unambiguous language of the Agreement uniformly and consistently to all Class Members. Adherence to the filing deadlines is one of those duties. This allows the Appellee the ability to project the number of eligible claims and aids in his determination of benefit amounts to be paid on certain APRS and EIF claims.

While the time restrictions are an integral and necessary part of the Agreement, they are not inflexible.

In addition to allowing for supplemental filings, CAP 29 explains under which circumstances Appellee may grant an extension of time, It also lists specific circumstances the Federal Courts have considered as an insufficient basis for an extension. It prohibits consideration of an otherwise valid claim notwithstanding the error of a Class Member's attorney in making a timely submission because that Class Member was relying on the advice of counsel. Paragraph 7.c of CAP 29 requires Appellee to consider "the reason for the neglect, if any, including whether such neglect was in the reasonable control of the Class Member requesting an extension of time." Appellant retained control over making a timely submission and the request for an extension was properly denied.

By order of the Special Master, Appellee's Final Determination of Zero Dollars ($0.00) is hereby AFFIRMED.

IN RE: SULZER HIP PROSTHESIS
AND KNEE PROSTHESIS PRODUCT
LIABILITY LITIGATION
Notice of Special Master Determination
CeCee C. Kane / Claim Number: 537585715
Joseph Kane I Claim Number: 533407542

Appellants and Appellee have fifteen days from the date of this decision to file with the Court, for the Special Master's review, a factor principle they believe the Special Master did not consider in rendering a decision. If no response is received by August 26, 2003, then the Special Master's Decision is final and may not be further contested or appealed.

August 11, 2003
Date

/s Leo M. Spellacy
Leo M. Spellacy, Esq,
Special Master

No. 05-678

IN THE SUPREME COURT OF THE UNITED STATES

CECEE C. KANE AND JOSEPH P. KANE,
Petitioners,

v.

SULZER SETTLEMENT TRUST,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI

RESPONDENT SULZER ORTHOPEDICS INC.'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether members of the settlement class are required to abide by the terms of the judicially approved Class Action Settlement Agreement that terminates this litigation?

PARTIES TO THE PROCEEDING

Petitioners Kane are Class Members of the certified class in *In re Sulzer Hip Prosthesis and Knee Prosthesis Products Liability Litigation*, MDL No. 1401 (United States District Court, Northern District of Ohio, Eastern Division, Case No. 1:01-CV-9000) whose applications for benefits pursuant to the Settlement Agreement in that class action were deficient and ineligible.

Respondents include Sulzer Orthopedics Inc. and Sulzer AG. Since approval of the Settlement Agreement, Sulzer Orthopedics Inc. was renamed Centerpulse, Inc, which was subsequently purchased by Zimmer Holdings, Inc. For purposes of consistency, Respondent Sulzer is identified, in this brief in opposition, as "Sulzer."

Respondents also include the Claims Administrator, James J. McMonagle, for the Sulzer Settlement Trust, who is required, pursuant to the terms of the Settlement Agreement, to receive, review, and pay to eligible Class Members, benefits from the Sulzer Settlement Trust.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Sulzer Orthopedics Inc. makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? YES

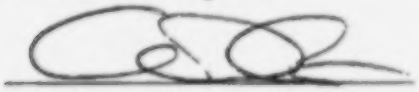
If the answer is YES, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

In May 2003, Zimmer Holdings, Inc., which is a publicly-owned company traded on the New York Stock Exchange under the ticker symbol "ZMH," acquired CenterPulse Ltd., whose subsidiaries included CenterPulse Orthopedics Inc., formally known as Sulzer Orthopedics Inc.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? YES

If the answer is YES, list the identity of such corporation and the nature of the financial interest:

Zimmer Holdings, Inc.



(Signature of Counsel)

12/28/05

(Date)

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TO PETITION FOR WRIT OF CERTIORARI

Respondent Sulzer respectfully submits this Brief in Opposition to the Petition for a Writ of Certiorari, filed by Petitioners Cecee and Joseph Kane, to review the Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit, filed on February 22, 2005 (App. 1a) and May 7, 2005 (App. 2a).

OPINIONS BELOW

Petitioners Kane have included in their Appendix and Supplemental Appendices the opinions from the District Court (February 6, 2004) and the Circuit Court of Appeals (February 22, 2005), 398 F.3d 782 (6th Cir. 2005).

JURISDICTION

The United States Court of Appeals for the Sixth Circuit issued its Order denying Rehearing En Banc on May 7, 2004 (App. 2a). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

SUMMARY OF THE ARGUMENT

Petitioners CeCee and Joseph Kane ("Petitioners") seek to manufacture grounds for certiorari review where none exist. Despite its complex procedural history and class action context, this is essentially a case about the District Court's interpretation and enforcement of the terms of the Class Action Settlement Agreement (CASA) over which it presided and approved as fair, reasonable, and adequate. In a series of three well-reasoned Memoranda and Orders, the United States District Court for the Northern District of Ohio (Judge Kathleen O'Malley) found that the CASA controlling the rights of class members such as Petitioners provided that final decisions on entitlement to class benefits by the Claims Administrator and Special Master were "final and binding." This straightforward determination was based on the plain language of Section 4.6 of the CASA, which provides that final determinations of the Special Master are "final and binding." This determination was based also on the District Court's knowledge that the parties intended "final and binding" to mean "final and binding."

Accordingly, the District Court declined to entertain Petitioners' "appeal" and others like it seeking review of the Special Master's final and binding denials of their untimely benefit claims. On appeal, the United States Sixth Circuit Court of Appeals in a one-page Opinion affirmed the findings of the District Court, adopting the reasoning and conclusion of the District Court that "the Settlement Agreement does not provide for an additional appeal of the special master's determination." *In re: Sulzer Orthopedics and Knee Prods. Liab. Litg.*, 398 F.3d 782 (6th Cir. 2005) ("Opinion") (Petitioners' Appendix at 1a).

The sole issue presented by this Petition is whether the Sixth Circuit erred in affirming the District Court's interpretation and application of the terms of the parties' judicially approved Class Action Settlement Agreement. This is an issue of contractual interpretation, and nothing more. No federal questions are implicated. No due process or constitutional violations are alleged. Nor is there any allegation that the Sixth Circuit has so far departed from the accepted and usual course of judicial

proceedings so as to call for an exercise of this Court' supervisory power.

Petitioners try to make it seem as if the Sixth Circuit's Opinion in this case somehow conflicts with the Eleventh Circuit's opinion in *Turner v. Orr*, 722 F.2d 661 (11th Cir. 1984). It does not. While the Eleventh Circuit concluded that the settlement agreement in that case did allow for District Court review of Special Master determinations, that Court's conclusion was the product of different underlying facts resulting in a different contractual interpretation of a different class action settlement involving different parties in different litigation. There is no conflict when different courts reach different conclusions due to different facts. Indeed, it is difficult to imagine how one court's decision interpreting the terms of one class action settlement agreement could conceivably conflict with the decision of another court interpreting the terms of a different class action settlement. It is the case-specific facts that compel the result, not a different application of legal principles.

COUNTERSTATEMENT OF THE CASE

This Petition represents the last-ditch efforts of untimely claimants seeking additional review to which they are not entitled under the terms of the Class Action Settlement Agreement. Petitioners, unhappy with the decision of the Claims Administrator and the Special Master denying their untimely claims for class benefits, sought further review with the District Court. Discontent with the District Court's refusal to entertain their unauthorized "appeal," Petitioners sought review from the Sixth Circuit. Dissatisfied with the Sixth Circuit's affirmance of the District Court, Petitioners now seek further unwarranted review from this Court through a writ of *certiorari*, despite the lack of any viable issue of federal law or circuit conflict. The extensive procedural history demonstrates why Petitioners can present no cogent grounds for *certiorari* review.

1. The Class Action Settlement and Litigation Background

This Petition arises out of the nationwide Sulzer Class Action Settlement, the background of which is more fully recounted in the District Court's February 6, 2004 Memorandum and Order. Petitioners' Supplemental Appendix at 7-23. Sulzer Orthopedics Inc. ("SOI") designed, manufactured and distributed orthopedic implants for hips, knees, shoulders and elbows. Included in its products were the Inter-Op™ Acetabular Shell, which is a component of a system used for hip replacements, and the Natural Knee® II Tibial Baseplate, which is used in total knee replacements. A manufacturing difficulty led to SOI's voluntary recall in 2000 of 40,000 units of the Inter-Op™ Acetabular Shell. SOI also notified the public that a problem existed with approximately 1,600 Natural Knee® baseplates.

Following the June 19, 2001 Order by the JPML consolidating and transferring all related pending federal litigation to the Northern District of Ohio and assigning oversight of the MDL proceedings to United States District Court Judge Kathleen M. O'Malley, the parties were eventually able to agree to a class settlement. On May 6-7, 2002, the District Court held a final fairness hearing to take additional evidence regarding the "fairness,

reasonableness, and adequacy" of the proposed settlement agreement, as well as the propriety of final class certification and the appropriateness of granting final approval of the settlement agreement.

During this two-day hearing, the Court received testimony from thirteen witnesses - all testifying in support of the proposed settlement. The Court allowed objectors to voice their concerns, but none spoke. Nevertheless, the Court undertook its own questioning of witnesses and pursued the concerns raised by all objectors, including those who had withdrawn their objections prior to the hearing. "[T]he message the Court received, from both represented and unrepresented Class members, was that it would be unjust and unfair if the Court did not approve the proposed Settlement Agreement." Accordingly, the CASA was approved in a June 4, 2002 Judgment Order, reported in *In Re: Sulzer Hip Prosthesis and Knee Prosthesis Liability Litigation*, 268 F. Supp. 2d 907 (N.D. Ohio 2003), and there were no appeals. SOI and related entities funded the $1.03 billion fund, and at the time of the Sixth Circuit briefing, the Claims Administrator had processed virtually all the 11,000 claim packets received, and had awarded over $700 million to beneficiaries of the settlement trust. Petitioners did not appear at the final fairness hearing, and did not submit any written objections challenging or seeking clarification of any provisions of the CASA.

2. The Parties Define the Rights of Class Members Through the Terms of the Class Action Settlement Agreement

The CASA sets forth in detail the class members' rights and benefit options.[1] The CASA requires that claim forms be submitted in order to request benefits. *See* CASA at Article 4. The CASA also sets forth the timeliness requirements for filing claim forms. Individuals seeking benefits from the Affected Product Revision Surgery Fund were required to submit an Orange Form for payment benefits within 180 days after approval of the Class Settlement, and 180 days after the applicable surgery. Thus,

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[1] A copy of the CASA is available at http://www.sulzerimplantsettlement.com/.

persons who underwent an affected product revision surgery before the CASA was approved were required to file their Orange Form on or before November 4, 2002.

In addition to thoroughly explaining the types of benefits available to Class Members and the procedures for seeking benefits, the CASA described the claims administration and review processes. Specifically, the CASA provides:

- Once a claim has been received by the Claims Administrator, the Claims Administrator must advise the claimant of any deficiencies. The claimant has seventy-five days to cure any deficiencies. See CASA at § 4.6(b).

- No fewer than ninety days after receipt of an acceptable claim form, the Claims Administrator is required to make a Preliminary Determination as to eligibility for benefits. *See Id.* § 4.6(c).

- A class member is entitled to contest Preliminary Decisions within forty-five days from the date of the Preliminary Determination by submitting additional information to support his/her position. *Id.* at § 4.6(d).

- No fewer than ninety days following any supplemental submission, the Claims Administrator must make a Final Determination of whether the class member is entitled to benefits. *Id.* at § 4.6(e).

- Within thirty days of the Final Determination by the Claims Administrator, the class member may appeal that decision to the Special Master by filing a notice with the District Court. *Id.* at § 4.6(f).

- The Class Settlement provides that "Any determination by the special master . . . shall constitute a final and binding determination." *Id.* at § 4.6(g). This provision makes clear that there are no additional appellate remedies.

- The concept of finality is further reflected in the Claims Administrator Procedure (CAP) 30, which provides that unless a class member moves for reconsideration of the Special Master's Decision within five days, "then the Special Master's Decision is final and may not be further contested or appealed."

Claimants who are unhappy with any aspect of the Claims Administrator's determination have several opportunities to seek review. These remedies, however, do not include District Court review of determinations made by the Claims Administrator or the Special Master, or Sixth Circuit review of the District Court's refusal to review Special Master Final Determinations.

3. The Claims Administrator and Special Master Deny Petitioners' Untimely Claims Pursuant to the Terms of the CASA

Petitioners, rather than "opting in" as they claim (Petition at 4), failed to opt out of the settlement, and then submitted an untimely claim for class benefits. While Petitioners argue that their claim forms were submitted prior to the dates payment was to issue (Petition at 4), there is no dispute that Petitioners' claims were untimely according to the carefully-negotiated and judicially-approved claims deadlines set forth in the CASA. Ms. Kane sought to recover under the CASA, and her husband sought derivative benefits. As Ms. Kane admits, her Orange Form was not filed until December 26, 2002 - despite the CASA's requirement that Orange Forms be filed by November 4, 2002.

Petitioners assert that the Claims Administrator summarily dismissed their claims. Petition at 4. To the contrary, the Claims Administrator carefully considered Petitioners' claim before rejecting it pursuant to the CASA's claims procedures. As the first step, the Claims Administrator issued a Preliminary Determination of Settlement Benefits on February 4, 2003 denying Ms. Kane's claim as untimely. Ms. Kane then filed a request for an extension of the filing deadline pursuant to Claims Administrative Procedure

("CAP") 29.[2] In their request for an extension, Petitioners argued that the Claims Administrator was estopped from denying her claim because it had already advanced her $30,000 in payments, and cited the prejudice she would suffer were her claim denied. After considering her request, the Claims Administrator denied it in a May 19, 2003 Final Determination in which it found that Ms. Kane had failed to demonstrate grounds excusing her late filing as set forth in CAP 29. On June 16, 2003, the Claims Administrator issued a similar Final Determination denying Mr. Kane's derivative claim as untimely.

Petitioners then appealed these orders to the Special Master. In their Brief to the Special Master, Petitioners conceded that their claims were 51 days untimely under Section 4.2(a) of the CASA, but argued that the late filing should be excused under the *Pioneer* factors. The Claims Administrator filed a Response to CeCee Kane's Notice of Appeal which argued that the Final Determination should be affirmed under the standards set forth in CAP 29, which essentially incorporates the Fed. R. Civ. P. 60.

On August 11, 2003, the Special Master issued a Notice of Special Master Determination. Petitioners' Appendix at 3a. Far from summarily dismissing Petitioners' claims as Petitioners allege, the Special Master affirmed the following findings made by the Claims Administrator: that Petitioiners submitted untimely Orange, Red and Yellow Forms for relief under the Affected Product Revision Surgery Fund, the Uninsured Affected Product Recipient Fund, and for derivative benefits; that the claims deadlines were an integral and inflexible part of the CASA that could not be abrogated; and that Petitioners did not present facts sufficient to warrant an extension of the filing deadlines for "excusable neglect" under the standards set forth in CAP 29. *Id.* The Special Master's Final Determination included both findings of fact and conclusions of law.

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[2] Paragraph four of CAP 29, which describes the circumstances giving rise to a permissible extension of time, is a literal adoption of the language of Fed. R. Civ. P. 60.

4. The District Court Rejects Petitioners' Efforts to Overturn the Final Decision of the Special Master as Barred by the Terms of the CASA

Having exhausted their avenues of review under the terms of the administrative procedures set forth in the CASA, Petitioners then attempted to appeal the Special Master's August 11, 2003 Determination directly to the Sixth Circuit Court of Appeals, despite the fact that it was not a final district court order capable of sustaining appellate jurisdiction. *See* 28 U.S.C. § 1291. (Appeal No. 03-4519). On October 2, 2003, Petitioners also filed with the District Court a Motion to Enforce Terms Of Class Action Settlement Agreement. That Motion, despite its title, moved the District Court pursuant to Section 9.1 of the CASA to interpret the terms of the CASA so as to allow Petitioners to participate in the Class Settlement despite their untimely filing. That Motion forthrightly declared that it was, in effect, "an **Appeal** to the District Court of the of the [sic] Special Master Determination of August 11, 2003 . . . ." *See* Petitioners' Supplemental Appendix at 21-22, n. 11. That Motion was accompanied by a seventeen-page Memorandum of Points and Authorities in Support of Motion to Enforce Terms of Class Action Settlement Agreement (CASA) and multiple exhibits. In that Memorandum, Petitioners argued that the Special Master had misinterpreted the facts and misapplied the law, and that their untimely claims should be honored under the *Pioneer* analysis or under the doctrine of substantial compliance.

Contrary to Petitioners' assertion, the District Court did not simply conclude it lacked jurisdiction to review the legal conclusions of the Special Master because the CASA "contained no provision authorizing such review." Petition at 5. In a series of three Memoranda and Orders, the District Court set forth the reasons why Petitioners' attempts and others like it seeking further review of Special Master determinations were null and void as contrary to the express language of the CASA and the intent of the parties. Before Petitioners even filed their Motion to Enforce the Terms of the Class Settlement, the District Court had already ruled in a September 18, 2003 Memorandum and Order that the CASA does not provide for additional appeals of Special Master's determinations to either the District Court or the Sixth Circuit

Court of Appeals, and declared all such documents filed with the District Court seeking to appeal or otherwise obtain review of Special Master determination to be null and void. Petitioners' Supplemental Appendix at 4.

In a February 6, 2004 Memorandum and Order, the District Court denied Petitioners' Motion to Enforce the Terms of the Class Settlement in a manner that reiterated and more fully explained its September 18, 2003 ruling. Petitioners' Supplemental Appendix at 7. In its thirty-page analysis, the District Court specifically rejected Petitioners' arguments that the Court should utilize its Section 9.1 powers to excuse Petitioners' late filing under the doctrine of "substantial compliance," or that Petitioners were entitled to District Court review because the Special Master was appointed pursuant to Fed. R. Civ. P. 53. Petitioners then appealed the District Court's February 6, 2004 Memorandum and Order to the Sixth Circuit Court of Appeals on February 18, 2004 (Appeal No. 04-3293).

On February 23, 2004, the District Court issued a third Memorandum and Order denying as void similar efforts by other class members to obtain some form of District Court review of the decisions of the Claims Administrator and Special Master. Petitioners' Supplemental Appendix at 38. On March 10, 2004, Petitioners sought to amend the Notice of Appeal to Case No. 04-3293 to include both the February 23, 2004 Memorandum and Order, and a subsequent Notice of Special Master Determination affirming denial of Extraordinary Injury Fund benefits. (Feb. 20, 2004 Notice of Special Master Determination) (Appeal No. 04-3361).

5. The Sixth Circuit Court of Appeals Denies Petitioners' Appeal as Unauthorized by the CASA

As noted above, Petitioners appealed to the Sixth Circuit: (1) the Special Master's August 11, 2003 Final Decision that Ms. Kane's claims for benefits were untimely (Case No. 03-4519); and (2) the District Court's February 6, 2004 Memorandum and Order denying the Motion to Enforce Terms of Class Action Settlement Agreement (Case No. 04-3293). Petitioners also sought to appeal

the Notice of Special Master Determination denying Extraordinary Injury Fund benefits, and the District Court's February 23, 2004 Memorandum and Order, by amending their Notice of Appeal to Case No. 04-3293.

SOI filed a motion to intervene in the appeals, and the Claims Administrator filed a motion to dismiss. The Sixth Circuit ultimately consolidated Petitioners' appeals with the pending appeals of another member of the settlement class, Linda Mediate. On June 7, 2004, the Sixth Circuit ordered that SOI could proceed as a defendant-appellee, thereby mooting its motion to intervene. All motions to dismiss were referred to the merits panel for review, and a briefing schedule was entered. Petitioners filed an appellate brief on June 24, 2004. SOI and the Claims Administrator each filed appellate briefs July 16, 2004.

Following oral argument September 23, 2004, the Sixth Circuit issued the following Opinion on February 22, 2005:

> Linda Mediate, CeCee Kane, and Joseph P. Kane, plaintiffs in this consolidated appeal, attempted to challenge the district court findings of the Special Master regarding their entitlement to benefits resulting from the multi-district litigation class action Settlement Agreement. The district court refused jurisdiction over their challenge and we AFFIRM that judgment.
>
> The Settlement Agreement between the parties provides the following: (1) a settlement plaintiff may apply for settlement benefits by submitting the required forms to the Claims Administrator; (2) the Claims Administrator will then make a determination regarding the plaintiff's entitlement to benefits; (3) if the plaintiff disagrees with the Claims Administrator's determination, he may file an appeal with the court-appointed Special Master; and (4) "[a]ny determination by the special master . . . shall constitute a final and binding determination."

> Plaintiffs, who were duly entitled to benefits under the Settlement Agreement, were disqualified from receiving such benefits because their attorneys failed to file their forms in a timely manner with the Claims Administrator. Plaintiffs then challenged their disqualification, proceeding through the steps outlined above. The Special Master ultimately denied their challenge, and plaintiffs then sought to appeal that decision to the district court.
>
> The district court properly refused to hear their challenge, explaining that the Settlement Agreement does not provide for an additional appeal of the special master's determination. Plaintiffs' challenge attacks the terms of the Settlement Agreement, and neither this Court nor the district court has the authority to entertain such an attack. *See Brown v. County of Genesee*, 872 F.2d 169, 173 (6th Cir. 1989) (internal quotations omitted) ("[A] court must enforce the settlement as agreed by the parties and is not permitted to alter the terms of the agreement."). We adopt the reasoning and conclusion of the district court, and AFFIRM its judgment.

Petitioners' Appendix at 1e-f.

Petitioners now seek a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

ARGUMENT

No reasons exist for this Court to grant a writ of *certiorari* to review the judgment of the Sixth Circuit in this case. The Supreme Court Rules make clear that only special circumstances will merit *certiorari* review: "Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons." Rule 10, S. Ct. Rules.

None of the circumstances outlined in Supreme Court Rule 10 that might merit *certiorari* review apply in this case. The Sixth Circuit's Opinion does not conflict with the decision of any other United States Court of Appeals or any state court of last resort. Rule 10(a), S. Ct. Rules. Nor does the Sixth Circuit's judgment decide any important federal issues, much less decide such issues in a manner that conflicts with any decision by this Court or by another court. Rule 10(b), S. Ct. Rules. Nor has the Sixth Circuit in its one-page Opinion so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure so as to call for an exercise of this Court's supervisory power. Rule 10(a), S. Ct. Rules.

The Sixth Circuit simply affirmed the District Court's conclusion that the CASA provided no right to appeal final and binding decisions of the Special Master: The only issues that would be implicated by review of the Sixth Circuit's well-reasoned but unremarkable opinion would be those of contractual interpretation of this particular class action settlement agreement.

1. The Sixth Circuit's Opinion Conflicts in No Way With the Eleventh Circuit's Opinion in *Turner v. Orr.*

Petitioners claim that the Sixth Circuit's Opinion in this case conflicts with the Eleventh Circuit's analysis in *Turner v. Orr*, 722 F.2d 661 (11th Cir. 1984). Petition at 5. Petitioners are wrong. The Sixth Circuit's analysis in this case is perfectly consistent with the Eleventh's Circuit's analysis in *Turner* – in both cases the courts looked at the language of the class settlement and the intent of the parties to construe the meaning of the settlement agreement. The fact that the Eleventh Circuit in *Turner* ultimately arrived at a

different conclusion than the Sixth Circuit in this case is due wholly to the difference in the underlying facts in these cases, not due to the application of some conflicting rule of law.

The "sole issue" in *Turner* was whether the "Special Master" appointed pursuant to the consent judgment between the parties was a Special Master whose decisions were intended to be final and binding, or a Special Master appointed pursuant to Fed. R. Civ. P. 53 whose decisions were subject to district court review. *Id.* at 662. The Eleventh Circuit in *Turner* reversed the district court and found that the Special Master *was* a Rule 53 Special Master, but did so based on case-specific facts that in no way conflict with the analysis of the Sixth Circuit or the District Court in this case.

In this case, the District Court's painstaking analysis of the Rule 53 issue demonstrates why the facts in this case compelled a different conclusion than that reached by the Eleventh Circuit in *Turner*. In its February 6, 2004 Memorandum and Order affirmed by the Sixth Circuit, the District Court carefully considered and utterly rejected Petitioners' contention that Rule 53 compelled district court review of Special Master decisions:

> The flaw in this argument is that the position of the Special Master that was created by the Settlement Agreement is not the same as the position of Special Master discussed in the Federal Rules of Civil Procedure. Neither the parties nor the Court ever contemplated any possibility of an appeal being taken by any party (whether a plaintiff or defendant) from the benefits determination of the Special Master appointed under the Settlement Agreement. Indeed, the parties designed the entire claims administration process with the specific goal of avoiding the involvement of any court with benefit determinations.

Petitioners' Supplemental Appendix at 27-28 (emphasis in original).

The District Court rejected the Rule 53 argument for several well-considered, factually-supported reasons. First, the District Court noted that nothing in the CASA refers to Rule 53, and that the District Court never invoked Rule 53. *Id.* at 28-29. To the contrary, the District Court observed that it had appointed the Special Master not pursuant to Rule 53, but rather pursuant to Section 4.6(g) of the CASA, which provides: "Class Counsel together with the Special State Counsel Committee shall appoint a Special Master (subject to the approval of the Court) to make a determination with respect to such Final Determination." *Id.* at 28.

The District Court further reasoned that the Special Master was not a Rule 53 Special Master because his appointment was inconsistent with the procedural requirements of Rule 53. Specifically, the District Court noted that it did not itself appoint the Special Master as required by Rule 53, but merely confirmed the appointment of the Special Master by counsel as mandated by the CASA. *Id.* at 28-29. Nor did the District Court enter an "order of reference" specifying or limiting the powers of the Special Master as required by Rule 53. *Id.*

More fundamentally, the District Court, relying on its oversight of the settlement negotiations, observed that the interpretation of the Special Master as a Rule 53 Special Master would be absolutely inconsistent with the intent of the parties to bypass the judiciary and to create a finite and efficient claims administration process:

> Indeed, it was precisely because the parties wanted to avoid the involvement of this or any other Court with benefit determinations that they explicitly agreed the Special Master's decision would be "a final and binding determination" of benefits. Settlement Agreement § 4.6(g) (emphasis added). There is, of course, no appeal from a "final and binding determination," and the parties negotiated for precisely this result. As designed, the claims administration process provided a mechanism to quickly and fairly compensate deserving plaintiffs commensurate with their injuries, with several levels of review. Once important aspect of this design was that

> the Claims Administrator would know the entire universe of claims within a certain time period; until the universe was known, he could not make various benefit determinations and payments. Kane's insistence that she should be allowed to "appeal the Special Master's determinations to this Court (or the Sixth Circuit Court of Appeals) is to insist that the Claims Administrator delay these payments to other class members indefinitely. This is not the deal that counsel designed, or to which the parties, including Kane, agreed.

Id. at 29.

The District Court further noted that SOI's subsequent behavior further supported the conclusion that the parties never intended the Special Master to be a Rule 53 Special Master. Although Rule 53 grants both defendants and plaintiffs the right to seek district court review of Special Master determinations, the District Court was quick to observe that SOI had never sought district court review of any final Special Master determination. *Id.* at 29-30.

The District Court finally observed that to accept Petitioners' position that the Special Master is a Rule 53 Special Master would be to "literally open the floodgates of legal claims." *Id.* at 30-31. Such an interpretation would undermine the precious certainty and finality desired by all parties and memorialized in the claims administration procedures set forth in Section 4 of the CASA. Any class member whose claims had been denied, or even any class member whose claims had been approved but wanted more benefits, would be allowed to swamp the courts with appeals, tie up the settlement resources, and diminish the settlement funds. *Id.* Based on this exhaustive analysis, the District Court concluded that Rule 53 was inapposite:

> In sum: (1) the Special Master appointed by counsel pursuant to the Settlement Agreement was not appointed by the Court pursuant to Rule 53 and (2) the Special Master's determinations

> are not appealable to this Court under Rule 53 or the Settlement Agreement."

Id. at 31.

The differences between the operative facts of this case and those underlying the Eleventh Circuit's analysis in *Turner* could not be more striking: First, the Eleventh Circuit found that the district court in *Turner* erred by relying on the testimony of counsel for plaintiffs that the parties never intended to provide a right to appeal, where plaintiffs had in fact previously appealed special master decisions to the district court. 722 F.2d at 665. In contrast, SOI has, as found by the District Court, never attempted to appeal any decision by the Special Master. Such behavior is entirely consistent with the conclusion that the parties never intended the Special Master to be a Rule 53 Special Master.

Second, the district court in *Turner* erred by failing to credit the opposing testimony of the defendants that the parties did indeed intend for there to be a right of appeal. *Id.* In this case, Petitioners could point to no countervailing testimony of the parties' intent. To the contrary, the District Court in its February 23, 2004 Order concluded that, based on the settlement history, the parties had intended to avoid such judicial entanglements:

> The parties were in complete agreement that this claims administration process should be completely extra-judicial; the parties believed that, given the extreme volume of work involved and the need to satisfy precise deadlines, the timing of any judicial process would be too uncertain.

Petitioners' Supplemental Appendix at 19.

Third, the district court in *Turner* erred in relying on ambiguous settlement terms that may or may not have limited the parties appellate rights. 722 F.2d at 664-65. In this case, the Sixth Circuit affirmed the District Court's conclusion that CASA § 4.6(g) is unambiguous:

> The Settlement Agreement between the parties provides that: (1) a settling plaintiff may apply

> for settlement benefits by substituting the required forms to the Claims Administrator; (2) the Claims Administrator will then make a determination regarding the plaintiff's entitlement to benefits; (3) if the plaintiff disagrees with the Claims Administrator's determination he may file an appeal with the court-appointed Special Master; and (4) "[a]ny determination by the special master . . . shall constitute a final and binding determination." Settlement Agreement § 4.6(g). . . . The Settlement Agreement does NOT provide for an additional appeal of the special master's determination to this Court. Nor does it provide an additional appeal of the special master's determination to the Sixth Circuit Court of Appeals.

Petitioners' Appendix at 1e-f.

The operative facts driving the decisions in these cases could not be more different. Each case involves different contractual language, different settlement and procedural histories, and different underlying facts. These decisions conflict no more than one decision holding one contract to mean one thing in one context conflicts with another decision finding a different contract to mean something different in another context.

2. This Petition Raises No Issues Regarding the Application of Fed. R. Civ. P. 53 or Any Other Federal Rules or Issues.

Petitioners also insinuate that the Sixth Circuit's Opinion raises issues regarding the interpretation and application of Rule 53 of the Federal Rules of Civil Procedure. But it does not. The relevant issue which the Sixth Circuit addressed was not *how* Rule 53 is to be applied, but *whether* Rule 53 is to be applied, which is nothing more than an issue of contractual interpretation. Petitioners boldly assert that there is "no question that the Special Master in this case was a Rule 53 Special Master under *Turner*, and that the District Court had an obligation under Rule 53 to

review his legal determinations." Petition at 6. But neither the District Court nor the Sixth Circuit agreed with Petitioners' position. The Sixth Circuit's opinion in no sense implicates Rule 53 or its application, or indicates that questions of law determined by a Rule 53 Special Master are not reviewable by the District Court. The point of the District Court and the Sixth Circuit's analysis is that Rule 53 and its application are *not* implicated by the controlling terms of the CASA. Nor are any other issues of federal law.

No ruling before this Court interprets or applies Fed. R. Civ. P. 53. The sole issue is whether the District Court, which oversaw and approved the class settlement from start to finish, abused its discretion in determining that the Special Master appointed by the parties was not a Rule 53 Special Master or by interpreting the CASA so as to prohibit any right of appeal to the District Court. This Petition presents no relevant federal issues.

3. The Sixth Circuit's Opinion Does Not Conflict with Other Decisions Applying the *Pioneer* Analysis.

Nor does the Sixth Circuit's analysis conflict in any sense with "the decisions of multiple circuits holding that the determination of whether to allow participation of late claimants in a class action is essentially an equitable decision within the discretion of the Court." Petition at 3. In none of those decisions had the parties agreed to delegate that determination to the final and binding determination of a Special Master. It is unchallenged that the district court is typically invested with the discretion to determine whether late claimants should nonetheless be allowed to recover pursuant to the "Pioneer Factors" set forth in *Pioneer Inv. Servs. v. Brunswick Assoc. Ltd. P'ship*, 507 U.S. 380 (1983). But it is equally unchallenged that parties to a class action settlement agreement may agree to conclusively delegate that discretion to a third party such as a Special Master. It is also unchallenged that the Claims Administrator and the Special master *did* apply the Rule 60(b) *Pioneer* factors pursuant to CAP 29 to determine whether Petitioners should be allowed to recover class benefits notwithstanding their untimely filings.

What Petitioners omit is the fact both the Claims Administrator and the Special Master *did* apply the *Pioneer* factors to Petitioners' untimely claims and determined that the facts did not merit allowing their untimely claims. Petitioners cannot fault the standards applied to determine whether their untimeliness should be excused. Petitioners' sole complaint is that they do not like the *result* of the Claims Administrator and Special Master's *Pioneer* analysis, and now wish to speak to someone else. But, as the Sixth Circuit and the District Court found, the express terms of the Class Action Settlement Agreement prohibit such additional review.

The application of the *Pioneer* factors is in no way implicated by the Sixth Circuit's opinion. The only orders before the Sixth Circuit for review were the series of District Court Orders declining to review the final determination by the Special Master. At no point did the District Court reach the issue of the merits of the Special Master's final determination, and at no point did the District Court issue any "final decision" on the merits of that issue capable of sustaining appellate jurisdiction. *See* 28 U.S.C. § 1291. While Petitioners purported to appeal the merits of the Special Master's final determination denying their claim for benefits as untimely as a "de facto" district court decision, there is no support for that summary assertion, and the Sixth Circuit understandably did not reach the issue of whether the Special Master erred in its application of the *Pioneer* factors.

4. The Petition Raises No Important Issues Regarding the Equitable Responsibility of the District Court to Entertain Review of Administrative Proceedings.

Petitioners also assert that the District Court abdicated its duty to review class appeals from Special Master determinations, and that the Sixth Circuit abdicated its duty to require the District Court to do so. Petition at 5. Petitioner maintains that Section 9.1 of the CASA's reservation of jurisdiction required the District Court to entertain review of appeals from Special Master decisions and to excuse Petitioners' untimely filings. Petition at 8. Section 9.1 provides that:

> The Court shall retain exclusive and continuing jurisdiction of the Complaint, the Parties, all Class Members (other than a Class Member who exercises an Opt-Out Right pursuant to Section 3.8), Sulzer, Sulzer AG, and the other Released Parties, and over this Settlement Agreement with respect to the performance of the terms and conditions of the Settlement Agreement, to assure that all disbursements are properly made in accordance with the terms of the Settlement Agreement, and to interpret and enforce the terms, conditions, and obligations of this Settlement Agreement.

See Petitioners' Supplemental Appendix at 26-27 (*quoting* CASA at § 9.1).

But the District Court had already fully addressed this argument in its February 6, 2004 Memorandum and Order in which it concluded that Section 9.1 empowers it to only enforce the terms of the CASA as written, not to abrogate agreed-upon provisions for the benefit of untimely filers to the detriment of the rest of the class:

> But this provision weighs against Kane, not for her. The deadlines that Kane (and other claimants) seek to avoid are important "terms and provisions" that were carefully and explicitly negotiated by the parties. The Court must enforce these deadlines as written, if it is to "assure that all disbursements are properly made in accordance with the terms of the Settlement Agreement." Thus the Court rejects the argument that claimants should be allowed to obtain benefits under the Settlement Agreement, even though they did not comply with its critical terms.

Petitioners' Supplemental Appendix at 27 (emphasis in original).

By the same analysis, the District Court could no more have used Section 9.1's power to enforce the terms of the CASA to

create a right of review of Special Master determinations in derogation of Section 4.1 than it could have used Section 9.1 to suspend the filing deadlines as requested by Petitioners. The Sixth Circuit specifically affirmed the District Court's refusal to accept Petitioners' invitation to use Section 9.1 to rewrite the substantive terms of the CASA:

> Plaintiffs' challenge attacks the terms of the Settlement Agreement, and neither this Court nor the district court has the authority to entertain such an attach. *See Brown v. County of Genesee*, 872 F.2d 169, 173 (6th Cir. 1989) (internal quotations omitted) ("[A] court must enforce the settlement as agreed by the parties and is not permitted to alter the terms of the agreement . . . .").[3]

Petitioners' Appendix at 1f.

What Petitioners mischaracterize as the exclusion "of a permanently injured class member and scores of others similarly situated . . . from a class action created for their benefit without judicial review" (Petition at 8) is in reality simply the enforcement of the negotiated and judicially approved terms of the CASA as written to protect the rights of the vast majority of class members who filed timely claims, and the preservation of the integrity of the claims administration process against Petitioners' attack. The alternative would be to devolve into precisely the morass of litigation the parties intended to avoid through these provisions. Indeed, the District Court forecast that granting Petitioners the relief they seek would "literally open the floodgates of legal claims." Petitioners' Supplemental Appendix at 30-31.[4]

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[3] Petitioners incorrectly argue that the Sixth Circuit erred in relying on *Brown v. Gillette*, 723 F2d 192 (1st Cir. 1983). Petition at 7. The decision relied upon by the Sixth Circuit in its Opinion is *Brown v. County of Genesee*, 827 F2d 169 (6th Cir. 1989). Petitioners' Appendix at 1f.

[4] In its Orders the District Court noted the proliferation of "appeals" seeking District Court review of Special Master determinations in some form or another. Petitioners' Supplemental Appendix at 30-31. A dozen more related appeals noticed to the Sixth Circuit followed this case, and more would inevitably

Petitioners assert that "[I]nterpretation is not alteration or attack." Petition at 6. But Petitioners' proffered "interpretation" is indeed an untimely collateral attack on the viability of the CASA where no such "interpretation" of the plain language of Section 4.6 is required, and, if it were, such a counterintuitive "interpretation" of the term "final and binding" to mean "final and appealable" would contradict the intent of the parties to avoid the type of lengthy appeals such an "interpretation" would allow.

Petitioners do not allege any due process violations. Petitioners do not claim that any particular aspect of the CASA or its application to their claims is so arbitrary and capricious as to deny them due process. They simply disagree with the District Court's conclusion that Section 9.1 of the CASA compels it to enforce the terms of the CASA as written, which precludes further review of final and binding decisions of the Special Master pursuant to Section 4.1 of the CASA. Again, Petitioners' point devolves to a simple issue of contractual interpretation.

Indeed, any decision that failed to give effect to the plain language of the parties' express contractual agreement through Section 4.1 of the judicially approved and unchallenged CASA that final decisions of the Special Master would be "final and binding" would contravene the well-established line of authority from this Court and other courts denying courts the authority to rewrite the terms of parties' settlement agreements.[5] The District Court recognized this in denying Petitioners' requests for review:

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have followed had the Sixth Circuit not closed the floodgates. *See* Appeal Nos. 04-3222; 03-4325; 03-4518; 04-3360; 04-3375; 04-3374; 04-3376; 04-3127; 04-3359; 04-3385; 04-3421.

[5] *Evans v. Jeff D.*, 475 U.S. 717, 726, 106 S. Ct. 1531, 1537 (1986) ("Rule 23(e) does not give the court the power, in advance of trial, to modify a proposed consent decree and order its acceptance over either party's objection"); *Brock v. Scheuner Corp.*, 841 F.2d 151, 154 (6th Cir. 1988) (holding that the judiciary must enforce the terms of a settlement agreement "as agreed by the parties and is not permitted to alter the terms of the agreement"); *In re: Southern Ohio Correctional Facility*, 191 F.3d 453 (Table), 1999 WL 775830 (6th Cir. 1999) (holding district court was not empowered to modify provisions of class action settlement agreement); *Brooks v. Georgia State Bd. Of Elections*, 59 F.3d

> Now, however, may claimants ask the Court to do what the law expressly says it may not do – "delete, modify or substitute certain provisions" contained in the Settlement Agreement, because those provisions are in some way "unfair" as applied to them.

Petitioners' Supplemental Appendix at 34. Indeed, the Sixth Circuit explicitly recognized this controlling line of authority in its Opinion by citing *Brown v. County of Genesee*, 872 F.2d 169. Petitioners' Appendix at 1f.

1114, 1120 (11th Cir. 1995) (holding that the judiciary lacked "the power to *modify the effective dates* in the proposed settlement agreement.") (emphasis added); *Walitalo v. Iacocca*, 968 F.2d 741, 750 (8th Cir. 1992) (holding that "[b]y imposing liability . . . for expenses not within the definition of 'costs,' the court impermissibly altered the parties' settlement agreements."); *Cotton v. Hinton*, 559 F.2d 1326, 1333 (5th Cir. 1977) (explaining that the judiciary is "not free to delete, modify, or substitute certain provisions of the settlement. The settlement must stand or fall as a whole."); *Jeff D. v. Andrus*, 899 F.2d 753, 758 (9th Cir. 1989) ("[C]ourts are not permitted to modify settlement terms or in any manner to rewrite agreements reached by parties."); *In re Warner Comms. Secs. Litig.*, 798 F.2d 35, 37 (2d Cir. 1986) ("[I]t is not a district judge's job to dictate the terms of a class settlement; he should approve or disprove a proposed agreement as it is placed before him and should not take it upon himself to modify its terms.").

CONCLUSION

Respondent SOI respectfully requests that this Court deny Petitioners' Petition for a writ of *certiorari*. This Petition does not, as Petitioners claim, raise issues of "exceptional importance in the future of class actions nationwide." Petition at 9. The reviewability of Special Master decisions in class settlements will continue to turn on the specific language and intent of the parties as memorialized in the settlement agreement, not upon any sweeping rule of law. This Petition raises nothing more than the Sixth Circuit's sound, but unremarkable Opinion affirming the District Court's interpretation of this particular Class Action Settlement Agreement.

Respectfully submitted,

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Dated: December 29, 2005

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been sent via first-class mail this 29th day of December, 2005 to the following:

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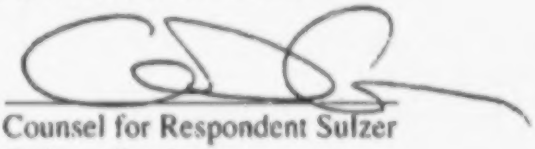

Counsel for Respondent Sulzer
Orthopedics Inc.

No. 05-678

IN THE

Supreme Court of the United States

CeCEE C. KANE AND JOSEPH P. KANE,

Petitioners,

v.

SULZER SETTLEMENT TRUST,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT JAMES J. MCMONAGLE, AS CLAIMS ADMINISTRATOR

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QUESTION PRESENTED

Whether a class member in a class action settlement may, after the time for objection to the proposed settlement has lapsed, and after the time for appealing from the trial court's order approving the settlement has lapsed, seek to undo the court approved settlement agreement's procedures for administering claims for settlement benefits?

PARTIES TO THE PROCEEDING

Petitioners Kane are Class Members of the certified class in *In re Sulzer Hip Prosthesis and Knee Prosthesis Products Liability Litigation*, MDL No. 1401 (United States District Court, Northern District of Ohio, Eastern Division, Case No. 1:01-CV-9000) whose applications for benefits pursuant to the Settlement Agreement in that class action were deficient and ineligible.

Respondents include the Claims Administrator, James J. McMonagle, for the Sulzer Settlement Trust, who is required, pursuant to the terms of the Settlement Agreement, to receive, review, and pay benefits to eligible class members from the Sulzer Settlement Trust.

Respondents also include Sulzer Orthopedics Inc. ("Sulzer"). Since approval of the Settlement Agreement, Sulzer was renamed Centerpulse, Inc., which was subsequently purchased by Zimmer, Inc. For purposes of consistency, Respondent Sulzer is identified, in this brief in opposition, as "Sulzer."

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Respondent Claims Administrator James J. McMonagle respectfully submits this Brief in Opposition to the Petition for a Writ of Certiorari, filed by Petitioners Cecee and Joseph Kane, to review the Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit, filed on February 22, 2005 (App. 1a) and May 7, 2005 (App. 2a).

OPINIONS BELOW

Petitioners Kane have included in their Appendix and Supplemental Appendices the opinions from the District Court (February 6, 2004) (Supplemental App. 7), and the Circuit Court of Appeals (February 22, 2005), 398 F.3d 782 (6th Cir. 2005) (App. 1e).

STATEMENT OF THE CASE

On March 13, 2002, the U.S. District Court for the Northern District of Ohio ("District Court") preliminarily approved, pursuant to F.R.C.P. 23(b)(3), a class action settlement ("Settlement Agreement") in *In re Sulzer Hip Prosthesis and Knee Prosthesis Product Liability Litigation*, MDL No. 1401. A comprehensive notice campaign ensued and the Court conducted a Fairness Hearing on May 6, 2002. No objector appeared at the Fairness Hearing. Petitioners did not object to the Settlement Agreement and did not exercise their right to opt out of the Settlement.

On May 8, 2002, the District Court approved the Settlement Agreement as fair and adequate and comporting with the requirements of F.R.C.P. 23. On June 4, 2002, the District Court entered an order formally approving the Settlement Agreement and implementing the Settlement Agreement's requirements enjoining non-opt-out litigation.

No person or Class Member, including Petitioners, objected to the Court's June 4, 2002 order. No person or class member, including Petitioners, noted an appeal from the June 4, 2002 Trial Court Approval Order and, in accord with applicable rules of appellate procedure and the terms of the Settlement Agreement, the Settlement Agreement received Final Judicial Approval on July 8, 2002.

In reliance upon the Settlement Agreement having received Final Judicial Approval, Sulzer fully funded the Sulzer Settlement Trust, with $1.045 billion, as required by the Settlement Agreement. In reliance upon Final Judicial Approval, Sulzer also made subsequent fundings to the Sulzer Settlement Trust as required by the Settlement Agreement. In reliance upon Final Judicial Approval, the Claims Administrator, James J. McMonagle, received, reviewed, processed, and paid Claims for Settlement benefits, as required by the Settlement Agreement.

To date, the Claims Administrator has processed more than 19,000 Claims for Settlement benefits from more than 11,000 Claimants. Those applications have, in turn, resulted in the Claims Administrator's payment of more than $964 million in Settlement benefits to more than 10,000 Class Members.

The parties to the Settlement Agreement made detailed and careful provision for the administration of claims for Settlement benefits. These provisions included:

1. Prescribed forms for submitting Claims for Settlement benefits.

2. The Claims Administrator's "completeness" review of a benefit application to determine whether a Claimant's submission was deficient and to give notice to the Claimant of the deficiency before any benefit determination was made.

3. Following a notice of incompleteness or deficiency, the Claimant's opportunity to supplement with new evidence or argument a Claim to show why an incomplete or deficient Claim should be awarded benefits.

4. After deficiency notice and opportunity to cure, the Claims Administrator's issuance of a Preliminary Determination of Settlement benefits.

5. After receipt of an adverse Preliminary Determination, the Claimant's opportunity, again, to contest the adverse Preliminary Determination by providing new evidence or argument regarding his Claim.

6. After reviewing any contest to the Preliminary Determination, the Claims Administrator's issuance of a Final Determination of Settlement benefits.

7. After receiving an adverse Final Determination of Settlement benefits, Claimant's opportunity to appeal that Final Determination to a party-appointed special master for a "final and binding" determination of Settlement benefits.

Settlement Agreement § 4.6. In addition, the Claims Administrator, with the approval of Class Counsel and the Special State Counsel Committee, and in the manner ordered by the District Court, adopted processing guidelines governing the receipt and payment of late Claims (Claims Administrator Procedure 29). Claims Administrator Procedure 29 adopted the guidelines for receiving late submissions prescribed in F.R.C.P. 60, this Court's decision in *Pioneer Invest. Srvcs. Co v. Brunswick Assoc. Ltd. Partnership*, 507 U.S. 380 (1993), and applicable law from the U.S. Court of Appeals for the Sixth Circuit. Petitioners Kane availed themselves of the Claims Administration process contemplated by the Settlement Agreement.

Notwithstanding, however, the clear requirement that the party-appointed special master's benefit determination was to be "final and binding," Settlement Agreement § 4.6(g), Petitioners Kane sought review of the adverse final decision from the party-appointed special master by the District Court. That review, had it happened on its merits, would have rendered the terms "final and binding" in the Settlement Agreement nullities inasmuch as the administrative process would have concluded in a determination that was neither final nor binding. The Settlement Agreement plainly and explicitly prescribed the claims administration process described above. It contained no provision for a post-administrative process review because no post-administrative process would be necessary for determinations that are "final and binding."

Upon review of the Petitioners' challenges to the results of the administrative process contemplated by the Settlement Agreement, the District Court ruled that Petitioners had exhausted their claims administration opportunities when

they sought, and received, review by the party-appointed special master. The District Court further ruled that no further review of a Settlement determination, after the party-appointed special master's review, was permissible and therefore declined to review the party-appointed special master's determination on its merits. District Court's February 6, 2004 Memorandum and Order (Supplemental App. 7). The District Court reasoned:

1. that the parties to the Settlement Agreement had reasonably crafted exhaustive claims administration procedures;

2. that they had reasonably elected that those administration procedures occur administratively so as to maximize their efficiency while minimizing Class Members' and the Trusts' transactional costs;

3. that those administrative procedures were intended to vindicate Class Members' reasonable expectations of opportunities to cure deficient Claims;

4. that review of administrative decisions in the District Court would undercut and contradict the purposes and provisions of the Settlement Agreement's explicit administration processes;

5. that the Settlement Agreement's administration processes had been approved by the Court in an order that had not, at least in that respect, been the subject of any objection and

not in any respect the subject of an objection by Petitioners;

6. that District Court's order approving the Settlement Agreement had not been the subject of any timely appeal and its provisions, including its provisions pertaining to the prescribed claims administration process, could not be collaterally attacked years after becoming final;

7. that the District Court did not have the authority to approve in part and disapprove in part the class action Settlement Agreement negotiated by the parties; and

8. that by denying Petitioners review of their administrative decision in the District Court, the District Court was properly exercising its continuing jurisdiction under the terms of the Settlement Agreement to implement the Settlement Agreement as agreed by the parties and approved by the District Court.

District Court's February 6, 2004 Memorandum and Order. (Supplemental Appendix at 7).

Petitioners sought review of the District Court's February 6, 2004 Order in the U.S. Court of Appeals for the Sixth Circuit. By unanimous opinion, a panel of the U.S. Court of Appeals affirmed the District Court's opinion and explicitly adopted its reasoning. (App. 1e). The U.S. Court of Appeals denied Petitioners' Petition for Rehearing *En Banc*. (App. 2a). Petitioners now seek review in this Court.

REASONS FOR DENYING THE PETITION

Rule 10 of the Rules of the Supreme Court of the United States guides this Court's consideration of whether to award a writ of *certiorari*. Petitioners do not expressly invoke Rule 10(a), but its provisions are the sole basis contemplated by Rule 10 that may be applied to the present Petition. The decision below is neither in conflict with the decision of another United States Court of Appeals on the same important matter, nor does the decision below so far depart from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power. Sup. Ct. R. 10(a).[1] Petitioners' challenge amounts to one of contract interpretation with no significant precedential value beyond the administration of this single class action settlement.

Petitioners' principal argument is that the adverse decision rendered by the party-appointed special master in this case ought to have been reviewed by the District Court. As a threshold matter, this question is not an "important matter" that is an appropriate issue for review by this Court. Party-appointed special masters in class actions are exceedingly rare. Indeed, Petitioner has pointed to no case anywhere before or since this case wherein the parties to a class action settlement agreement agreed to appoint, themselves, a special master for purpose of concluding a benefit determination. While that process is obviously important to the Sulzer Settlement Trust and to the efficient and orderly administration of the present class action

1. Sections (b) and (c) of Rule 10 are inapplicable to this case because no ruling of a state court is at issue here. Petitioners do not argue otherwise.

settlement, given the infrequent use of that process in other settlements, it cannot be said the issue is an important one of federal law that this Court ought to consider. Indeed, and for understandable reasons, nowhere do Petitioners contend otherwise.

Nor is the decision of the Court of Appeals for the Sixth Circuit in conflict with another Circuit on the same issue. Petitioners urge, Petition for Writ of Certiorari at 5, that the decision below is in conflict with *Turner v. Orr,* 722 F.2d 661 (11th Cir. 1984). That position, however, misreads *Turner,* the decision of the Court below, and the administration scheme in the present class action settlement.

First, unlike in the *Sulzer* settlement, *Turner* involved a Special Master referral made by the District Court. *Turner,* 722 F.2d at 663 ("Because no agreement was reached, the district court entered an order appointing a special master.") Therefore, the holding in *Turner,* that that special master referral was one contemplated by F.R.C.P. 53, is unremarkable. By contrast, the Settlement Agreement in this class action settlement explicitly contemplated appointment of a special master *by the parties*: "In the event of such an appeal [of a Final Determination issued by the Claims Administrator], *Class Counsel together with the Special State Counsel Committee shall appoint* a special master (subject to the approval of the Court) to make a determination with respect to such Final Determination." Settlement Agreement § 4.6(f)(emphasis added).

The distinction is not merely semantic. F.R.C.P. 53 may well require that special master referrals, made by a District Court, be reviewed to one extent or another by the District Court. But referral of the matter *by the Court* is the triggering

mechanism for District Court review. F.R.C.P. 53. Otherwise, as in this case, a special master appointed by the parties is merely an extra-judicial means for expeditious, alternative, dispute resolution, which is precisely the conclusion of the District Court and the Circuit Court of Appeals, below. (App. 1e, Supplemental App. 30).

Second, unlike in *Turner,* the Settlement Agreement in the *Sulzer* Settlement made abundantly clear that the administration process contemplated by Section 4.6 was intended by the parties to be exhaustive. As noted above, the Settlement Agreement made detailed and rigorous administration requirements culminating, explicitly, in a "final and binding" decision. The reviewing courts in *Turner* made no factual or legal findings regarding the special master in that case, analogous to the findings, with respect to the party-appointed special master, made explicitly by the District Court in this case. (Supplemental App. 20, *et seq.*) (District Court's comprehensive discussion of how the claims administration process came to be negotiated and why Settlement deadlines and processing steps were integral to the bargain the parties struck). A contrary result, that the parties made provisions for expensive, detailed, exhaustive, claims administration, but elected to leave open-ended the requirement of full blown review on appeal to the District Court, would be absurd. Moreover, it would be plainly inconsistent with the intended mechanism here for streamlined, expeditious review of many thousands of claims. *Id.*

Petitioners wisely do not argue that the result in this case is "so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power." Such an argument would be without merit. The District Court in this case applied the plain terms

of the Settlement Agreement, in accordance with its retained jurisdiction to supervise implementation of the Settlement Agreement, which interpretation the Circuit Court of Appeals readily agreed was correct. (App. 1e). To the contrary: had the District Court or Court of Appeals grafted onto the Settlement Agreement the additional layers of claims administration that Petitioners now seek, doing so would have run afoul of the requirements that those Courts give effect to their previous, unappealed final orders, and that courts reviewing class action settlements abstain from approving and disapproving them in part. *Evans v. Jeff D.*, 475 U.S. 717, 727 (1986).[2]

For the foregoing reasons, Petitioners have failed to carry their burden to identify appropriate bases upon which this Court might appropriately exercise its discretion to award a writ of certiorari. Several additional points bear mentioning why this Court ought to quickly deny this petition.

The administration requirements for this class action depend upon finality of benefit decisions after the party-appointed special master renders a benefit decision. That certainty permits the efficient operating of the claims

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2. Petitioners unfairly slight the opinion of the Court of Appeals below by asserting that that Court cited to only one case as its legal authority for affirming the District Court. Petition for Certiorari at 7. The Court below adopted the reasoning and ruling of the District Court, (App. 1e), which rendered its decision in a lengthy, well-reasoned, and densely supported opinion (Supplemental App. 7-37). Petitioners have received deliberate consideration throughout the claims administration process, to which they agreed to be bound, and now have received that same consideration, in excess of that for which they bargained, in the District Court and the Court of Appeals for the Sixth Circuit.

administration process. If the Claims Administrator were required to await possible trial of claims issues in the District Court, the uncertainty of those decisions, and their possible implications for other claimants, would paralyze claims administration. While Petitioners state the only matters that might be relitigated in the District Court, after party-appointed special master review, are "legal questions," they point to nothing in the Settlement Agreement that would purport to require such a limitation. Even if there were such a limitation, the pendency of perhaps thousands of legal rulings in the District Court would cripple the claims administration process. Indeed, the pendency of the current appellate litigation, and its accompanying uncertainty for claims administration processes, has caused the delay in full payment of Settlement benefits to more than a thousand Class Members eligible for benefits from the Extraordinary Injury Fund.

Finally, as has been noted elsewhere in the course of this appeal, *see* Amicus Brief in the Court of Appeals for the Sixth Circuit of Weitz & Luxenberg law firm, the Settlement Class in this case is elderly. Delay in paying out benefits runs the risk that benefit awards made a year or more ago, will not be payable until after an eligible Class Member has died. So that Class Members may enjoy the full benefits of the Settlement Agreement quickly and meaningfully, the Claims Administrator urges speedy denial of the present petition.

CONCLUSION

For these reasons, Respondent Claims Administrator James McMonagle urges that Petitioners' Kane Petition for a Writ of Certiorari be denied. No important federal question is raised by Petitioners. The decision of the Court below is not in conflict with a decision of another Circuit Court on the same issue. No abuse of discretion occurred, or is alleged, such that this Court should invoke its supervisory powers in this matter.

Respectfully submitted,

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2

No. _____

In the

Supreme Court of the United States

CeCee C. Kane and Joseph P. Kane,
Petitioners,

v.

Sulzer Settlement Trust,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR WRIT OF CERTIORARI SUPPLEMENTAL APPENDIX DISTRICT COURT OPINIONS

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APPENDIX INDEX

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 1:01-CV-9000

IN RE: SULZER
HIP PROSTHESIS
AND KNEE PROSTHESIS
LIABILITY LITIGATION

(MDL Docket No. 1401)
JUDGE O'MALLEY
JUDGMENT AND ORDER
DATE OF ENTRY: June 4, 2002

On May 8, 2002, the Court entered an Order certifying the Plaintiff Class and granting final approval to the Settlement Agreement.[1] See docket no. 340 ("Final Approval Order"). The Final Approval Order stated that the opt-out deadline would be May 15, 2002. The Final Approval Order also stated that the Injunction Order shall automatically expire on 5:00

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[1] In the Final Approval Order, the Court specifically concluded that: (1) the class (and subclasses) identified in the Fifth Amended and Consolidated Class Action Complaint, and also in the Settlement Agreement, satisfies the requirements of Fed. R. Civ. P. 23(a), as well as Fed. R. Civ. P. 23(b)(2) and (b)(3); (2) the Notice that was sent to the Class was the best practicable under the circumstances, and satisfies the requirements of Fed. R. Civ. P. 23(c)(2) & (e); (3) the proposed settlement was reached after extensive arms-length negotiations and is premised upon substantial inquiry into and discovery relating to all legal and factual issues relevant to the propriety of the proposed Settlement Agreement; and (4) the proposed Settlement Agreement is fair, adequate, and reasonable, and meets the requirements of Fed. R. Civ. P. 23(3). Order at 3. The Court specifically incorporates those conclusions and the rest of the Final Approval Order here, by reference.

p.m, EST, June 7, 2002.

The Settlement Agreement, as modified,[2] provided that the Sulzer defendants retained the right to terminate and withdraw from the Agreement at any time prior to May 31, 2002.. Agreement at §10.1. The Sulzer defendants chose not to withdraw from the Agreement, filing a "notice of appearance" on May 31, 2002 (docket no. 352.)

Accordingly, pursuant to Section 13.3 of the Settlement Agreement, the Court hereby **ORDERS** as follows:

- the Court's prior certification of the Settlement Class, under Fed. R. Civ. P. 23(a), 23(b)(2) and 23(b)(3), for Settlement purposes only, is hereby **CONFIRMED**.
- the Court's prior appointment of the Class Representatives identified in the Settlement Agreement at 3, §1.1(t), as the representatives of the Settlement Class, is hereby **CONFIRMED**.
- the Court's prior conclusion that the proposed Settlement Agreement is fair, adequate, non-collusive, and reasonable, and meets the requirements of Fed. R. Civ. P. 23(e), is hereby **CONFIRMED**.
- all claims and actions asserting Settled Claims[3] against Sulzer or Sulzer AG pending before the Court (other than claims and actions of a Class Member who exercises an Opt-Out Right pursuant to Section 3.8 of the Settlement Agreement), are hereby **DISMISSED WITH PREJUDICE**., and without costs; however, in the event that Final Judicial Approval is not obtained, these claims and/or actions may be reinstalled to their status quo position at the

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[2] The termination provision of the Settlement Agreement, which appears at docket no. 237, was modified by docket no. 348.

[3] The term "Settled Claims" is defined in the Settlement Agreement at 9, §1.1(zzz). Other terms used in this Order may also be found in the definitions section of the Settlement Agreement.

time of dismissal, both procedurally and substantively.

- all Class Members (other than a Class Member who exercises an Opt-Out Right pursuant to Section 3.8 of the Settlement Agreement) entitled to benefits under the Settlement Agreement are hereby **PERMANENTLY ENJOINED** from asserting and/or continuing to prosecute against Sulzer, Sulzer AG or any other Released Party any and all Settled Claims which the Class Member (other than a Class Member who exercises and Opt-Out Right pursuant to Section 3.8 of the Settlement Agreement) had, has, or may have in the future in any federal or State court;
- the Court **RESERVES** continuing and exclusive jurisdiction over the Parties, including Sulzer, Sulzer AG, and the Class Members (other than a Class Member who exercises an Opt-Out Right pursuant to Section 3.8 of the Settlement Agreement), to administer , supervise, interpret, and enforce the Settlement Agreement in accordance with its terms, and to supervise the operation of the Sulzer Settlement Trust.

This judgment is entered pursuant to Fed. R. Civ. P. 58, and is a final appealable Order.

IT IS SO ORDERED.

s/ Kathleen M. O'Malley
KATHLEEN McDONALD 'MALLEY
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 1:01-CV-9000

IN RE: SULZER
HIP PROSTHESIS
AND KNEE PROSTHESIS
LIABILITY LITIGATION

(MDL Docket No. 1401)
JUDGE O'MALLEY
MEMORANDUM AND ORDER
DATE OF ENTRY: September 18, 2003

A number of plaintiffs have filed documents purporting to "appeal" determinations made by the Special Master regarding their entitlement to benefits. See nos. 936 ("appeal" by plaintiff Freund), 963 ("appeal" by plaintiff Lee), 981 ("appeal" by plaintiff Vasquez), 994 ("appeal" by plaintiff Carpenter), 970 (motion to amend by plaintiff Carpenter)[1], 1017 ("appeal" by plaintiff Van Deventer), and 1059 ("appeal" by plaintiff Sak).[2] These motions and appeals must all be

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[1] Plaintiff Carpenter attacked the Special Master's benefit determination in two ways – she filed an "appeal" at docket no. 994, and also a motion to amend at docket no. 970. With the latter motion, Carpenter seeks to amend Claims Administrator Procedure no. 29 ("CAP 29"), arguing that the application of CAP 29 by the Claims Administrator and the special Mater unfairly deprived her of benefits, so the Court should amend the CAP. The essence of this motion to amend remains, however, a request that this Court review the Special Master's final determination.

[2] See also docket no. 1093, which is a similar appeal by plaintiff Mediate to the Sixth Circuit. The Court **DIRECTS THE CLERK OF COURTS** to forward a copy of this Order to the Sixth Circuit Court of Appeals in connection with Mediate's appeal.

OVERRUED .

The Settlement Agreement between the parties in this case provides that (1) a settling plaintiff may apply for settlement benefits by submitting the required forms to the Claims Administrator, (2) the Claims Administrator will then make a determination regarding the plaintiff's entitlement to benefits; (3) if the plaintiff disagrees with the Claims Administrator's determination, he may file an appeal with court-appointed Special Master; and (4) "[a]ny determination by the special master ... shall constitute a final and binding determination." Settlement Agreement at §4.6(g).

The Settlement Agreement is a binding contract between the parties. If a given plaintiff elected not to opt out of the class-action Settlement Agreement, and to file a claim for benefits, then that plaintiff also agreed to be bound by all of the provisions of that Settlement Agreement, including the one quoted above. As such, a determination by the special master regarding whether, or to what extent, a given plaintiff is entitled to benefits under the Settlement Agreement is "a final and binding determination." The Settlement Agreement does NOT provide for an additional appeal of the special master's determination to this Court. Nor do it provide an additional appeal of the special master's determination to the Sixth Circuit Court of Appeals.

To the extent a settling plaintiff had any right of appeal from the terms and application of the Settlement Agreement, it was only a right to appeal the Court's June 4, 2002 Order, which gave official approval to all of the terms and conditions contained in the parties' Settlement Agreement and dismissed the plaintiffs' settled claims with prejudice. See docket no. 353. The Court's June 4, 2002 Judgment Order, however, was never appealed by any party.

Accordingly, the Court hereby **DECLARES** that any and all documents filed with this Court by any plaintiff purportedly seeking and "appeal" to this Court, or otherwise seeking review by this Court, of a benefits determination by the

special master are a nullity and are **VOID.** This holds true whether the putative "appeal" was previously filed or is hereafter filed, and the Court will not address them further.

IT IS SO ORDERED.

s/ Kathleen M. O'Malley
KATHLEEN McDONALD 'MALLEY
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 1:01-CV-9000

IN RE: SULZER HIP PROSTHESIS AND KNEE PROSTHESIS LIABILITY LITIGATION

(MDL Docket No. 1401)
JUDGE O'MALLEY
MEMORANDUM AND ORDER
DATE OF ENTRY: February 6, 2004

Class-member CeCee Kane moves this Court to enforce the terms of the class-action settlement agreement in this case (docket no. 1179). For the reasons stated below, this motion is **DENIED.**[1] Kane's motion for an Order addressing the prior motion (docket no. 1578) is **DENIED** as moot.

I. Background

The Court has recited the long and complicated factual and procedural background of this case in earlier opinions, and does not repeat all of it here. See, e.g., In re Sulzer Hip Prosthesis and Knee Prosthesis Liability Litigation, 268 F. Supp. 2d 907, 910-21 (N.D. Ohio 2003) (docket no. 738 at 3-22). Below, however, the Court sets out an abbreviated history of this case, highlighting certain aspects to give context to this Order.

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[1] Technically, the Court is granting Kane's motion, as the Court is enforcing the terms of the Class Action Settlement Agreement, as written. The Court's denial of Kane's motion is premised on its conclusion that, to interpret the Settlement Agreement in the way Kane argues it should be interpreted, would be not to enforce the Agreement as written.

A. Litigation Leading Up To Settlement

Sulzer Orthopedics, Inc. ("Sulzer Orthopedics") is a designer, manufacturer, and distributor of orthopedic implants for hips, knees, shoulders, and elbows.[2] One of the products manufactured by Sulzer Orthopedics is known as the "Inter-Op acetabular shell," which is one component of a system used for complete hip replacements. Another product manufactured by Sulzer Orthopedics is the "Natural Knee II tibial baseplate," which is one component of a system used for a total knee replacement. While some orthopedic implants are cemented or screwed into position, others are designed to allow the bone to grow into and around them, holding them securely in place. The Sulzer Inter-Op and Natural Knee II products were bother designed to bond with the natural bone.

About three years ago, Sulzer Orthopedics began to suspect that a manufacturing defect [3]was preventing some of its Inter-Op shells from bonding properly with the acetabulum bone. In early December of 2000, Sulzer Orthopedics announced a voluntary recall of approximately 40,000 units of its Inter-Op shell, of which about 26,000 had already bee

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[2] During the relevant time-frame, Sulzer Orthopedics was wholly owned by Sulzer Medica USA Holding Company ("Sulzer Medica USA"), and Sulzer Medica USA was wholly owned by Sulzer Medica Ltd. ("Sulzer Medica"), a Swiss company. Sulzer AG, another Swiss company, owned 74% of Sulzer Medica. On July 10, 2001, during the course of this litigation, Sulzer AG divested itself of all but about 5% of its shares in Sulzer Medica. On June 1, 2002, Sulzer Medica, Sulzer Orthopedics, and several related entities changed the "Sulzer" and "Sulzer Medica" portions of their names to "Centerpulse." The names changed again, after the Swiss firm Zimmer Holdings, Inc. acquired Centerpulse on October 2, 2003. For the sake of consistency with Court's prior Orders, this Order uses the old "Sulzer" monikers.

[3] The Court recognizes that the defect was merely alleged and never proved at trial. For ease of reference, however, and in light of Sulzer Orthopedics' voluntary recall and certain apparent concessions made, the Court occasionally refers in this memorandum to the medical devices as "defective," rather than "allegedly defective."

implanted in patients. Sulzer Orthopedics then "reprocessed" some of the recalled units – that is, "re-cleaned" about 16,500 of the never-implanted, recalled shells – and then resold them. About 6,100 of these reprocessed units were implanted.

After Sulzer discovered the problem with the Inter-Op shells, the company reviewed its manufacturing processes for its other medical implant products. This review led Sulzer Orthopedics to discover that it had used a similar manufacturing process during fabrication of its Natural Knee II tibial baseplate. Just as it did with the Inter-Op shell hip implants, Sulzer Orthopedics voluntarily notified the public that a problem existed with certain Natural Knee tibial baseplates. Sulzer Orthopedics also asked its distributors and sales agents to return any Natural Knee baseplates manufactured from July 2000 to December 2000 that had not already been implanted. Sulzer did not "reprocess" any Natural Knee baseplates. The suspected manufacturing defect occurred during production of about 1,600 Natural Knee baseplates, about 1,300 of which were implanted in patients.

As of today, over 3,500 of the patients who received implants of the defective Inter-Op shells have undergone "revision surgery" – removal of the defective implant and replacement with a new one. In addition, about another 170 patients who received "reprocessed" Inter-Op shells have undergone revision surgery. Further, over 600 revision surgeries for the Natural Knee baseplate implants have occurred. Sulzer Orthopedics now estimates that virtually all of those medically eligible patients who will need revision surgery to replace these defective medical devices have already undergone it. The majority of these patients were elderly.

Shortly after Sulzer Orthopedics issued its voluntary recall of its Inter-Op shells in December of 2000, a number of plaintiffs around the country filed lawsuits, in both state and federal courts. By August 31, 2001, there were pending about 1,300 civil suits nationwide, about 200 of which were in federal court. These cases involved about 2,000 named plaintiffs, primarily including implant recipients and their

spouses. About 19 of the state court cases were styled as class actions, as were about 34 of the federal court cases. The defendants named in these lawsuits included not only Sulzer Orthopedics, but also: (1) Sulzer Medica USA; (2) Sulzer Medica; (3) Sulzer AG; (4) various other Sulzer-related entities; and (5) various surgeons, hospitals, and medical supply companies connected to the distribution or implantation of the defective product. The causes of action in these lawsuits included claims for defective design, marketing, and manufacture; breach of express and implied warranties; negligence; strick liability; and other legal theories of recovery. On August 30, 2001, the first of these cases to go to trial ended with a substantial plaintiffs' verdict.

In early 2001, pursuant to 28 U.S.C. §1407, three different federal plaintiffs with Inter-Op shell hip implants filed motions with the Federal Judicial Panel on Multi-District Litigation ("MDL Panel"), seeking to consolidate and centralize 30 of the federal lawsuits. MDL docket no. 1401. On June 19, 2001, the MDL Panel granted these motions, consolidating and transferring all related pending federal litigation to the Northern District of Ohio and assigning oversight of the MDL proceedings to the undersigned. Eventually, virtually all of the federal cases involving the Inter-Op shells and Natural Knee baseplates – over 400 in all – were transferred to this Court.

Even before this MDL Panel assigned oversight of this case to this Court, Sulzer Orthopedics had begun to discuss the possibility of a class-action settlement with various attorneys around the country. Thus, fairly early in the course of this litigation – on August 15, 2001 – the parties filed a joint motion for Order conditionally certifying a class, and a joint motion for preliminary approval of a class settlement. On August 29, 2001, the Court granted the motions for conditional certification of an opt-out settlement class and preliminary approval of the proposed settlement agreement.

Although the Court did preliminarily conclude that the proposed settlement was fair and reasonable and adequate, it

was clear that a substantial number of plaintiffs and their counsel disagreed and intended, at that juncture, to opt out. Critically, however, the proposed settlement agreement was designed with the understanding that plaintiffs' counsel would have a period of time to pursue further discovery regarding the defendants' financial wherewithal. That is, the defendants agreed to make available all information reasonably requested by the plaintiffs that would reveal: (1) all of the assets of Sulzer Orthopedics, its parent Sulzer Medica USA, and its Swiss grandparent, Sulzer Medica Ltd.; (2) all of the insurance policies held by these entities that might be available to pay claims; and (3) the likelihood the plaintiffs could "piece the corporate veil" and pursue claims against Sulzer Orthopedics' "great grandparent," Sulzer AG. As the Court explained in its Order granting conditional approval:

> If plaintiffs conclude that the information they obtain through this discovery shows there is more money available to pay plaintiffs than is currently contemplated by the settlement agreement, then the plaintiffs can withdraw from the agreement, or insist it be modified to account for those other sources of payment; class counsel has assured the Court, in fact, that plaintiffs will withdraw from the proposed agreement if they conclude that the defendants are contributing to this settlement less than substantially all of their available and reachable assets.
>
> Furthermore, the parties contemplate sharing all of this discovery information with counsel for all class members, including counsel appearing only in state court. This arrangement will ensure an extremely thorough viewing of the defendants' financial circumstances by those persons most interested in ensuring that, in fact, the defendants are "suffering" the maximum judgment they can withstand.

Order at 38-39 (docket no. 61).

Because the discovery task was formidable, the Court appointed ten lawyers to a Special State Counsel Committee ("SSCC") for the purpose of "assist in and/or monitor the discovery process." Order at 1 (docket no. 129). These lawyers, who represented class members but did not have a federal case pending within the MDL, joined plaintiffs' class counsel in the MDL to engage in substantial discovery and strenuous negotiation with counsel for the defendants. As a result of this discovery and negotiation process, counsel for the plaintiffs obtained a more accurate understanding of the defendants' finances, and ultimately uncovered additional sources of settlement funding.

After having completed their discovery and negotiations, the parties submitted a new proposed settlement agreement. The funding value of this new settlement agreement was substantially more favorable to the Plaintiff Class than was the first settlement agreement the Court had preliminarily approved on August 29, 2001. The primary improvement was that the "funding value" of the new agreement was approximately $1.045 billion, or about $447 million more than the first settlement agreement. As such, the promised compensation for the plaintiff class increased substantially. For example, compensation payable to a plaintiff who underwent one revision surgery increased from $37,000 in cash and $20,000 in stock to approximately $160,000, most of all of which was in cash, plus another $46,000 in cash available for payment of contingent attorney fees.

The Court conditionally approved this proposed agreement, and scheduled a final fairness hearing. Although the size of the Plaintiff Class exceeded 30,000 individuals (not including derivative claimants), the Court received only 30 or so objections to the fairness of the revised settlement agreement, and all but seven objections were withdrawn before the final fairness hearing.[4] Among the witnesses at this hearing

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[4] The benefits of the Final Settlement Agreement were described to class members and their attorneys, before the Final Fairness Hearing, in the

were a member of attorneys, representing hundreds of class members, who had vehemently objected to the first proposed settlement agreement; these attorneys now testified in support of the final proposed settlement agreement. Indeed, there was no witness who testified in opposition to the final proposed settlement agreement and no attorney who argued against its approval. The Court summarized the evidence at the final fairness hearing as follows:

> During this hearing, the Court received testimony from 13 witnesses, all testifying in support of the settlement. Though given the opportunity, no objector spoke at the hearing. The Court undertook its own questioning of witnesses and pursued the concerns raised by all of the objectors, including those who had withdrawn their objections prior to the hearing. It is not an overstatement to say that the evidence weighing in favor of the proposed settlement agreement was overwhelming. Attorneys who represent hundreds of class members and who had objected strongly to [the] earlier proposed settlement agreement joined in a chorus of support for the current proposed Settlement Agreement. A large number of attorneys and witnesses representing disparate interests all averred they believe the Settlement Agreement has extracted from the defendants close to the best terms possible without forcing the defendants into bankruptcy – an alternative that all felt would be disastrous for the Class. One witness – who had earlier opposed both national class certification and the terms of the first proposed settlement agreement – summed up when he testified he believes the current Settlement Agreement is "the best opportunity for the most people to recover the most money the soonest."[5] Essentially, the message the

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"Class Member and Attorney Guide," which may be viewed at http://www.sulzerimplantsettlement.com/

[5] As another witness stated, "this is the best mechanism for resolution in this particular case under these particular circumstances."

> Court received, from both represented and unrepresented Class members, was that it would be unjust and unfair if the Court did not approve the proposed Settlement Agreement.

Order at 2-3 (May 8, 2002) (docket no. 340)

Accordingly, on May 8, 2002, the Court entered an Order granting final certification to the national plaintiff class and sub-classes, and granting final approval to the settlement agreement between the plaintiff class and the Sulzer defendants. See docket no. 340. Because this Final Settlement Agreement provided that the Sulzer defendants retained the right to terminate and withdraw from the Agreement at any time prior to May 31, 2002, the Court's May 8, 2002 Order was not a final, appealable Order. After the Suzler Defendants elected not to exercise their right to terminate the Agreement, however, the Settlement Agreement became irrevocable and the Court entered an Order on June 4, 2002, confirming its May 8, 2002 Order and dismissing all settled claims with prejudice. See docket no. 353. The June 4, 2002 Order explicitly stated: "This judgment is entered pursuant to Fed. R. Civ. P. 58, and is a final appealable Order." Order at 2. Thereafter, no interested party filed a notice of appeal. Thus, there is no question but that the Court's June 4, 2002 Judgment Order, giving official approval to all of the terms and conditions contained in the parties' Settlement Agreement, was final.

B. The Final Settlement Agreement[6]

To understand fully some of the provisions that the plaintiff class members and the defendants included in their Final Settlement Agreement, it is important to know the

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[6] The Final Settlement Agreement may be viewed by visiting: http://www.sulzerimplantsettlement.com/ and clicking on "Amended Class Action Settlement Agreement."

parties' overriding concerns. As noted above, the first state court case against Sulzer Orthopedics to go to trial ended in a plaintiff's verdict. Specifically, on August 30, 2001, three plaintiffs in the Texas state court case of Rupp v. Sulzer Orthopedics, Inc. obtained a verdict exceeding $15 million. Given that there were literally thousands of similaryly-situated plaintiffs around the country, it was immediately clear to all parties that the total amount of Sulzer Orthopedics' assets was dwarfed by its likely total amount of liability. It was also clear that, if Sulzer Orthopedics simply declared bankruptcy, even a successful plaintiff would not receive any money for years. And, all parties agreed that Sulzer Orthopedics was worth more as a going concern, whether viewed from a social perspective (it employed many people, and manufactured valuable and useful medical products) or a purely financial perspective (a bankruptcy estate surely had less value than an operating business). Thus, the primary goals of the parties, as they attempted to negotiate a settlement, may be summarized as follows:

1. The plaintiffs wanted to receive the most compensation for their injuries that they could.

2. The plaintiffs wanted to receive compensation as quickly as they could, especially because many plaintiffs were elderly (their average age was over 60 years old), and also wanted to ascertain how much that compensation would be.

3. The plaintiffs wanted a mechanism allowing those who were more severely injured to obtain more compensation.

4. All parties wanted to avoid forcing Sulzer Orthopedics into bankruptcy and to allow it to continue as a going concern, partially to assure complete funding of all aspects of the settlement (including certain additional, later funding obligations Sulzer agreed to undertake).

> 5. All parties wanted to define the class and design the Settlement Agreement to ensure that all those who were injured because of the product defect obtained relief, but also ensure that those not injured by the product defect did not obtain any of the settlement funds.
>
> 6. Sulzer Orthopedics wanted to ensure that, through settlement, it would eliminate all outstanding liability to the plaintiff class and to those subrogated [th] their interests.
>
> 7. Sulzer Orthopedics also wanted to qualify, as surely as it could, the amount it would ultimately pay to completely settle the plaintiffs' claims, with few contingencies.

To meet the first and fourth goals, Sulzer Orthopedics and related companies gave the plaintiffs unprecedented access to their financial positions during discovery. As a result, the parties were able to agree on the maximum amount of money that the defendants could pay to the plaintiffs, without driving Sulzer Orthopedics into bankruptcy. This is how the Final Settlement Agreement came to be worth over $1.045 billion.

To meet the fifth goal, the parties included in their Final Settlement Agreement certain deadlines. For example, the Settlement Agreement provided that, for a class member to obtain benefits related to having undergone revision surgery to replace an Inter-Op shell, the class member had to obtain that surgery before June 5, 2003. Settlement Agreement at §3.4(b)(i).[7] This deadline (along with many others) was

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[7] There are actually dozens of negotiated deadlines related to different products and different medical procedures. Thus, while the deadline for revision surgery is June 5, 2003, for Inter-Op shells, the revision surgery deadline is November 17, 2003 for Natural Knee tibial baseplates, and September 8, 2004 for reprocessed Inter-Op shells. See Settlement Agreement at §3.4(b,c). There are also different deadlines associated with each product type and other related medical procedures, besides revision

carefully negotiated, and the subject of close examination by the Court at the final fairness hearing. The scientific and bio-statistical evidence showed that 99.9% or more of those class members who would need revision surgery as a result of the product defect would obtain it before this deadline; conversely, any person who obtained revision surgery on or after this deadline almost certainly needed it for reasons other than a defect in the product.[8] Thus, the parties negotiated numerous deadlines, based on epidemiological and other studies, to ensure that class members who needed revision surgery because of the product defect obtained benefits, while class members who needed revision surgery for other reasons did not receive any payment from the settlement funds.

Notably, the evidence and argument at the fairness hearing made clear that these deadlines were actually quite generous; Sulzer initially resisted these deadlines, based on its belief that they swept too broad a net, allowing for payments to individuals who were not actually injured by a defective product. Sulzer ultimately agreed to these generous deadlines, however, in order to advance the second, third, sixth, and seventh goals. By setting the chosen deadlines, Sulzer Orthopedics was confident that the Settlement Agreement would resolve its liability to all plaintiffs who suffered an injury that was proximately caused by a defect in its products. Furthermore, because the parties could predict how many class members would ultimately need and obtain revision surgery before the deadlines, and could project the likelihood that a class member would suffer any number of identified extraordinary injuries, the parties could: (1) determine with some precision how much each class member would receive, depending on the nature of their injuries; (2) determine how to apportion the total settlement funds into various sub-funds

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surgery (e.g., surgery to re-affix, rather than remove, the medical device).

[8] See Final Fairness Hearing tr. At 276-78 (Joseph Poirkowski); id. At 149-58 (Victor Goldberg). The evidence showed that, even in cases where patients receive an implant that has absolutely no defect, between 0.5 and 1.5 percent of patients later need revision surgery.

(e.g., $100 million into the Extraordinary Injury Fund, $622.5 million into the Affected Product Revision Surgery Fund, and $1 million into the Medical Research and Monitoring Fund; see Settlement Agreement at §2.2); and (3) allow Sulzer Orthopedics to forecast intelligently the cost of certain "contingent" liabilities (e.g., payment of class members' subrogated medical expenses, to the extent the total of such expenses exceeded $60 million; see Settlement Agreement at §3.9(a)). Indeed, these deadlines were integral to the creation of a "Guaranteed Payment Option," which claimants could select to speed up their receipt of benefits; see Settlement Agreement at §8.4 (promising claimants who obtained revision surgery at least $40,000 of their total benefits within 45 days). Furthermore, because the Settlement Agreement set out fairly precisely the amount of benefits and the timing of payment (which in turn, were premised on the deadlines), the number of class members who ultimately opted out of the Settlement Agreement was extremely low – less than 45 out of over 30,000 class members. This low opt-out rate also advanced the sixth and seventh goals.

Another important provision of the Settlement Agreement that was negotiated by the parties and examined carefully by the Court at the Final Fairness Hearing was inclusion of a detailed claims administration process. This process was designed to ensure the validity of claims, and to pay benefits to deserving claimants as efficiently and fairly as possible. Counsel for the plaintiffs, in particular, were afraid that the process of examining plaintiffs' claims for benefits, and the process of actually making payments for valid claims, might turn into a lengthy morass. This concern was based on the experience of all parties' counsel in other class-action settlements. Accordingly, the parties designed a mechanism for claims administration that included: (1) specified formats for submission of claims; (2) deadlines for submission of claims; (3) deadlines for review of claims by the Claims Administrator; and (4) several mechanisms for claimants whose claims were denied to cure deficiencies and obtain

review. See generally Settlement Agreement §4.6.[9] For example, the Settlement Agreement provided that a claimant who underwent revision surgery had to submit a claim form within 180 days, or six months. Id. §4.2(a). Within 90 days of receiving an acceptable claim form, the Claims Administrator had to issue a preliminary benefits determination. Id. §4.6(c). There then followed deadlines for: (1) challenges by plaintiffs to preliminary determinations; (2) issuance by the Claims Administrator of a final benefits determination; and (3) appeals of the final benefits determination to a Special Master. Id. at §4.6(d-f).[10] The parties were in complete agreement that this claims administration process should be completely extra-judicial; the parties believed that, given the extreme volume of work involved and the need to satisfy precise deadlines, the timing of any judicial process would be too uncertain.

Once again, the claims administration process, in all its detail, was specifically negotiated by the parties to advance the goals listed above. The six-month deadline for filing a claim for revision surgery benefits, for example, was deemed ample, even generous, to ensure that a plaintiff would not forfeit benefits because of any difficulty with the claims process, itself. On the other hand, the 6-month deadline ensured that the claims administration process would not extend too long, because certain payments by the Claims Administrator could not be made to any claimant until the entire universe of claims was known. See, e.g., Settlement Agreement at §3.4(b) (noting that the $160,000 revision surgery benefits are payable to a

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[9] Indeed, the claims administration process provides for up to four levels of review of a plaintiff's claim. See also http://www.sulzerimplantsettlement.com/. This website also includes links to: (1) "Claim Forms for Settlement Benefits," which sets out the Court-approved forms that claimants must use to make a claim; (2) "Important Dates," which summarized the deadlines for submission of claims; and (3) "Claims Administrator Procedures," which catalogs all of the procedures promulgated by the Claims Administrator.

[10] The Claims Administrator later added even another layer of review, adopting a procedure allowing plaintiffs to move the Special Master to reconsider. Claims Administrator Procedure 30(8).

plaintiff in two increments: (1) $130,000, payable within 45 days of the Claims Administrator's Final Determination; and (2) $30,000, payable within 45 days of "the date on which the Claims Administrator can make a reasonable estimate of the total number of [revision surgery] claims").

Thus, the Claims Administration deadlines were designed to advance the second goal listed above – getting compensation to deserving plaintiffs as quickly as possible, and ascertaining how much that compensation would be. The Claims Administrator process and procedures also: (1) helped ensure that plaintiffs who were injured because of the product defect would obtain relief, while those not injured by the product defect would not obtain settlement funds (the fifth goal); (2) made certain that more severely injured plaintiffs obtained more compensation (the third goal); and (3) allowed Sulzer Orthopedics to forecast the cost of certain "contingent" liabilities (the seventh goal). It is also notable that the cost of claims administration, itself – which had to be paid for out of the settlement funds – was fairly quantifiable and predictable, given the parties' knowledge of what the entire process involved.

Having set out this explanation of why the parties included certain provisions in their Settlement Agreement, and why the Court concluded after the Final Fairness Hearing that these particular provisions were "fair, adequate, and reasonable," the Court now examines the merits of Kane's motion.

II. Purported Appeals of Denials of Claims.

The claims administration process created by the parties and the Court has been a model of fairness and efficiency. In the 20 months following the Court's final approval of the Settlement Agreement in this case, the Claims Administrator has received claim packets form over 11,000 claimants. Each claim packet contains dozens (sometimes hundreds) of pages, including claim forms, medical records, insurance agreements, attorney-fee contracts, and other materials. In addition to

receiving and reviewing these documents, the Claims Administrator has fielded hundreds of telephone calls each month, helping plaintiffs and their attorneys understand the claims administrator process and their obligations. Despite this tremendous and painstaking workload, the Claims Administrator has processed virtually all of the claim packets. Already, the Claims Administrator has issued awards to beneficiaries of the Sulzer Settlement Trust totaling over $700 million. Still remaining is the even more exacting task of reviewing class members' individual claims on the Extraordinary Injury Fund.

As noted above, during the claims administration process, the Claims Administrator reviews each claim for timeliness relative to several deadlines that were negotiated by the parties. Further, claimants who are unhappy with any aspect of the Claims Administrator's determination, including his application of these deadlines, have several opportunities to seek review. Ultimately, a claimant may appeal the Claims Administrator's final determination to a "Special Master." See Settlement Agreement at §4.6(f). The Settlement Agreement makes clear that the Special Master's conclusion then become the "final and binding determination" of a plaintiff's claim.

Despite the provisions in the Settlement Agreement establishing the finality of the claims administration process, a large number of claimants have sought judicial review of the decisions of the Claims Administrator and Special Master. Some of these attempts to obtain review are directed to this court, and they come in several forms, including (1) "appeals" of the Claims Administrator's and/or Special Master's final decision (e.g., docket no. 1059); (2) "objections" to the Claims Administrator's and/or Special Master's final decision (e.g., docket no. 1257); (3) "motions for relief" from the Claims Administrator's and/or Special Master's final decision (e.g., docket no. 1667); (4) motions to amend the Claims Administrator's Procedures (e.g., docket no. 980); (5) motions to enforce the Settlement Agreement (e.g., Kane's motion,

docket no. 1179);[11] (6) motions to reconsider earlier Orders that denied requests for review (e.g., docket no. 1621); and (7) letters asking the court to direct the Claims Administrator or Special Master to reconsider. Other attempts to obtain review bypass this Court and are directed, instead, to the Sixth Circuit Court of Appeals. See, e.g., docket no. 1617 (purportedly taking an appeal "from the Special Master Determination of January 8, 2004").

In an earlier opinion, the Court tried to make clear that none of these mechanisms are allowed or appropriate, because the Settlement Agreement does not provide for them. In an Order dated September 18, 2003 (docket no. 1146), the Court addressed six requests, by five claimants, that this Court review the Special Master's "final and binding" determinations that they were not entitled to certain benefits. In examining five "appeals" to this Court of the Special Master's determinations, and one motion to amend the Claims Administrator's Procedures, the Court explained:

> The Settlement Agreement between the parties in this case provides that: (1) a settling plaintiff may apply for settlement benefits by submitting the required forms to the Claims Administrator; (2) the Claims Administrator will then make a determination regarding the plaintiff's entitlement to benefits; (3) if the plaintiff disagrees with the Claims Administrator's determination, he may file an appeal with court-appointed Special Master; and (4) "[a]ny determination by the Special Master...shall constitute a final and binding determination." Settlement Agreement at §4.6(g).

Order at 2. Accordingly, the Court overruled all six of the requests asking this Court to review, or force reconsideration of, the Special Master's determinations.

Since that time, the Court has received many dozens of

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[11] Kane also states that her motion to enforce "amounts to an appeal to the District Court of the Special Master Determination." Memo. in supp. at 1 n.1.

similar requests, like Kane's, seeking judicial review of the decisions of the Claims Administrator and Special Master. Most of these letters and motions simply ignore the Court's Order dated September 18, 2003. Some of the plaintiff class members, however, seek to distinguish this Court's earlier Order, raising different arguments as to why, in their particular case, judicial review is appropriate.

With the instant Order, the Court reaffirms its earlier conclusion that none of these arguments is persuasive, and none of the plaintiffs' requests for review is allowed or appropriate under the Settlement Agreement. Below, the Court addresses three arguments made most often by plaintiffs who purport to take an "appeal" to this Court from the determinations of the Claims Administrator or Special Master. Given the great number of requests for review, the Court will not issue a separate opinion addressing each one.

A. "Substantial Compliance"

Plaintiff Kane (and many other claimants) assert that, even though they missed certain deadlines, they should be excused from this failure because they "substantially complied" with the Settlement Agreement. By invoking substantial compliance, Kane asks this Court to use its equitable powers to allow him to avoid the strict settlement terms. See In re Eagle-Picher Inds., Inc., 285 F.3d 522, 529 (6th Cir. 2002), cert. denied, 537 U.S. 880 (2002) ("[t]he substantial compliance rule is an equitable doctrine"). "In general, substantial compliance means that a party has '[c]ompli[ed] with the essential requirements, whether of a contract or of a statute.'" Id. at 525 n.3 (quoting Black's Law Dictionary 1428 (6th ed. 1991).

Importantly, the doctrine of substantial compliance is not applicable if that part of the performance that did not occur was itself of substantial significance. "The theory of substantial compliance allows a court, acting in equity, to declare a contract provision satisfied although a party has made minor departures from the technical requirements of the

provision." Alling v. C.D. Cairns Irrevocable Trusts Partnership, 927 F. Supp. 758, 763 (D. Vt. 1996) (emphasis added). As the Tenth Circuit Court of Appeals has explained: By definition, the doctrine of substantial compliance does not materially modify a plan, but rather is simply a doctrine to assist the court in determining whether conduct should, in reality, be considered the equivalent of compliance under the contract. See John D. Calamari & Joseph M. Perillo, The Law of Contracts §11-15, at 454 (3rd ed. 1987) ("If a party has substantially performed, it follows that any breach he may have committed is immaterial.")

Peckham v. Gem State Mut. Of Utah, 964 F.2d 1043, 1052 (10th Cir. 1992).

In this case, Kane and other plaintiffs insist that their lateness is immaterial, a minor departure from the deadline requirements set out in the Settlement Agreement, and therefore may be overlooked. Whether this lateness is measured in weeks, as in the case of Kane's delayed filing of her claim forms, or merely days, as in the case of certain claimants who obtained revision surgery shortly after the deadline, many plaintiffs complain that strict adherence to the dates contained in the Settlement Agreement is unfair and oppressive. Kane asserts she "substantially complied" with the requirements of the Settlement Agreement by sending in completed claim forms and other necessary documents, even though she did not meet the stated deadline.

The problem with this argument is that, as discussed above, the parties paid special attention to the deadlines during negotiation of the Settlement Agreement. Their deadlines were based on a variety of factors, including bio-statistical studies, the cost of continuing the claims administration process itself, and the competing desires of ensuring that all injured plaintiffs receive compensation, while also ensuring that appropriate payments to the class are made as quickly as possible. Put simply, the deadlines are not immaterial, minor, technical

requirements; they were important underpinnings to the deal, with very real consequences to the defendants and to each member of the entire plaintiff class.

A simple example makes this clear. The Settlement Agreement provides that the Sulzer defendants will provide a fixed amount of funds toward settlement, plus additional funds contingent on the number of claimants. Specifically, the Settlement Agreement provides that, if more than 4,000 plaintiffs obtain revision surgery in connection with an Inter-Op shell or a Natural Knee tibial baseplate, and they "ma[k]e a claim in accordance with this Settlement Agreement," then Sulzer will pay half of the benefits to those claimants in excess of 4,000. Settlement Agreement §2.5(d).[12] In other words, for every such revision surgery claimant over 4,000, Sulzer has to pay additional funds toward settlement. Similarly, "in respect of subrogation or other claims for medical expenses paid on behalf of Class Members," Sulzer agreed to pay all such claims if the total exceeded $60 million. Id. §3.9(a). Obviously, if the Court allowed an "equitable" change in the deadlines of the Settlement Agreement, it could have a very significant impact on the amount of money Sulzer will have to pay for these "contingent" amounts.[13] Moving the deadlines back will only

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[12] To be more specific:

In the event that there are more than 4,000 Affected Products Recipients that have an Affected Product Revision Surgery relating to (i) an Inter-Op Shell (other than a Reprocessed Inter-Op Product) prior to June 5, 2003 and/or (ii) a Tibial Baseplate prior to November 17, 2003 and who have made a claim in accordance with this Settlement Agreement, the Parties agree that any benefits owed to such Class Member pursuant to Section 3.4(a), Section 3.5(b), Section 3.7 and Section 3.9(a) shall be borne equally by Sulzer and the Sulzer Settlement Trust such that Sulzer shall deliver to the Sulzer Settlement Trust 50% of any such benefit at the time such benefit is paid to a Class Member and the Sulzer Settlement Trust shall provide for the additional 50% with funds payable pursuant to Sections 2.5(a)-(c) above.

[13] In fact, there have been more than "4,000 Affected Products Recipients" as contemplated in the §2.5(d) of the Settlement Agreement, so Sulzer is having to pay these contingent amounts. The Settlement

increase the number of claimants over 4,000, making Sulzer's cost of settlement go up.

Further, an "equitable" change in the deadlines will also have a negative impact on the total amount of money received by each class member. After all contemplated payments from the Settlement Fund have been made, the Settlement Agreement contemplates a "pro rata" distribution to the claimants of any residue of funds. See Settlement Agreement §§5.2, 15.6. Moving back the deadlines will only increase the total number of claimants, and thus reduce the pro rata amount of residue each claimant may receive.

Put simply, to allow Kane and the dozens of other claimants who have missed the negotiated deadlines to now obtain benefits anyway would be to significantly alter the terms of the deal. The Sulzer defendants would pay more than they agreed, and successful claimants would receive less than they agreed. The differences could easily run into tens of millions of dollars. It is wrong and inaccurate to assert, as Kane and other claimants do, that neither the parties nor the Settlement Trust would suffer "any prejudice" if the Court allows them to avoid the deadlines by which they agreed to be bound when they chose to participate in the Settlement Agreement. The deadlines are not minor, technical details, and changing them would lead to important consequences unintended by the parties.

The Court also notes here that Kane and other claimants point to §9.1 of the Settlement Agreement to support their argument that this Court may use its equitable powers to allow for "substantial compliance" with deadlines. This provision states that

> the Court shall retain exclusive and continuing jurisdiction of the Complaint, the Parties, all Class

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Agreement also provides that, if more than 64 plaintiffs obtain revision surgery in connection with a reprocessed Inter-Op shell, Sulzer will have to pay all of the benefits to those claimants. Id. §2.5(c). Once again, there have, in fact, been more than 64 such plaintiffs, so Sulzer is having to pay these contingent amounts.

> Members (other than a Class Member who exercises an Opt-Out Right pursuant to Section 3.8), Sulzer, Sulzer AG and the other Released Parties, and over this Settlement Agreement with respect to the performance of the terms and conditions of the Settlement Agreement, to assure that all disbursements are properly made in accordance with the terms of the Settlement Agreement, and to interpret and enforce the terms, conditions and obligations of this Settlement Agreement.

Settlement Agreement §9.1.. But this provision weighs against Kane, not for her. The deadlines that Kane (and other claimants) seek to avoid are important "terms and provisions" that were carefully and explicitly negotiated by the parties. The Court must enforce these deadlines as written, if it is to "assure that all disbursements are properly made in accordance with the terms of the Settlement Agreement." Thus, the Court rejects the argument that claimants should be allowed to obtain benefits under the Settlement Agreement, even though they did not complay with is crucial claims.

B. Special Master

In their purported "appeals" to this Court, many claimants, including plaintiff Kane, assert that this Court has jurisdiction over such appeals, and indeed must accept and review such appeals, because the determination they want this Court to review was made by a "Special Master." These claimants point to Fed. R. Civ. P. 53(e)(2), which provides that a party may file objections to a Special Master's report and then move the Court to modify or reject the Special Master's recommended ruling. Kane insists the Court is obligated to review the Special Master's determination in her case, and she offers argument why the Special Master abused his discretion in concluding that she was not eligible for benefits under the Settlement Agreement.

The flaw in this argument is that the position of Special

Master that was created by the Settlement Agreement is not the same as the position of Special Master discussed in the Federal Rules of Civil Procedure. Neither the parties nor the Court ever contemplated any possibility of an appeal being taken by any party (whether a plaintiff or a defendant" from the benefits determination of the Special Master appointed under the Settlement Agreement. Indeed, the parties designed the entire claims administration process with the specific goal of avoiding the involvement of any court with benefit determinations.

As an initial matter, it bears noting that the Settlement Agreement never refers to Rule 53. More important, the Court never proceeds under Rule 53, nor invoked it. Rather, the Court proceeded pursuant to the Settlement Agreement, which provides that, if a claimant wishes to appeal the Claims Administrator's Final Determination of benefits, "Class Counsel together with the Special State Counsel Committee shall appoint a Special Master (subject to the approval of the Court) to make a determination with respect to such Final Determination." Settlement Agreement §4.6(f). Counsel and the Court subsequently agreed to the appointment of Leo M. Spellacy, a retired state-court judge, as the Special Master to review the Claims Administrator's benefit determinations. In a one-line order, the Court "approve[d] the appointment of the Honorable Leo M. Spellacy, Esq. as Special Master over appeals from the Claims Administrator's Final Determinations." Docket no. 623. The Court did not itself appoint the Special Master, as would be required under Rule 53(a), but only approved the appointment by counsel, as mandated under the Settlement Agreement.[14] Compare Settlement Agreement at §5.5 (stating that "The Court may appoint a Special Master" to review common benefit attorney fee applications) (emphasis addes). Further, the Court did not

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[14] When the parties negotiated and signed their Settlement Agreement, the 1993 version of the Federal Rules of Civil Procedure were in force. Thus, the Court refers to this version of the Rule 53, and note the more recent, 2003 version.

ever enter an "order of reference" that "specif[ied] or limit[ed] the master's powers," as normally would be required under Rule 53(c). This is because the Court, and the parties, were not proceeding under Rule 53. The Special Master's powers and duties were set out under the Settlement Agreement, not the Rules of Civil Procedure.

Indeed, it was precisely because the parties wanted to avoid the involvement of this or any other Court with benefit determinations that they explicitly agreed the Special Master's decision would be "a final and binding determination" of benefits. Settlement Agreement §4.6(g) (emphasis added). There is, of course, no appeal from a "final and binding determination," and the parties negotiated for precisely this result. As designed, the claims administration process provided a mechanism to quickly and fairly compensate deserving plaintiffs commensurate with their injuries, with several levels of review. One important aspect of this design was that the Claims Administrator would know the entire universe of claims within a certain time period; until the universe was knows, he could not make various benefit determinations and payments. Kane's insistence that she should be allowed to "appeal" the Special Master's determinations to this Court (or the Sixth Circuit Court of Appeals) is to insist that the Claims Administrator delay these payments to other class members indefinitely. This is not the deal that counsel designed, or to which the parties, including Kane agreed.

Furthermore, it is not a coincidence that only plaintiffs, and not Sulzer, have sought review of the determinations by the Claims Administrator and the Special Master. During negotiation of the Settlement Agreement, Sulzer agreed to the unusual proposition that it would have no say in the Claims Administration process, in return for the certainty it obtained with the series of deadlines. Sulzer also agreed that it could not challenge the Claims Administrator's determination by appealing to the Special Master, and could not challenge the Special Master's determination by appealing to this Court.

Rule 53 contemplates the filing of objections to a special master's determinations by either party. The mechanism of using a Special Master as actually employed by the Settlement Agreement makes it clear that Rule 53 is inapposite.

It is not overstatement to characterize the claims administration process agreed to by the parties in their Settlement Agreement as a form of binding arbitration. See Harrison v. Nissan Motor Corp. in U.S.A., 111 F. 3d 343, (3rd Cir. 1997) ("Arbitration is creature of contract, a device of the parties rather than the judicial process. If the parties have agreed to submit a dispute for a decision by a third party, they have agreed to arbitration.") (quoting AMF Inc. v. Brunswick Corp., 621 F.Supp. 456, 460 (S.D.N.Y. 1985) (Weinstein, J.)); see also AMF Inc., 621 F.Supp. at 460 ("[n]o magic words such as 'arbitrate' or 'binding arbitration' or 'final dispute resolution' are needed to obtain the benefits of the [Federal Arbitration] Act"). As such, the parties explicitly agreed to forego a judicial determination of benefits, including any judicial review of the final decision of the "arbitrator" – the Claims Administrator or Special Master. The only exception to this rule might be if the Special Master's final determination of benefits was a product of corruption, fraud, prejudice, or misconduct. Decker v. Merrill Lynch, Pierce, Fenner & Smith, Inc. 205 F.3d 906, 909 (6th Cir. 2000) (citing 9 U.S.C. § 10(a)). But neither Kane nor any other claimant makes any such allegation; rather, Kane and the other claimants all insist the Special Master abused his discretion. There is no "appeal" allowed to this Court for an abuse of discretion in these circumstances.

Finally, it cannot be ignored that to accept Kane's position is literally to open the floodgates of legal claims. If a claimant can appeal any determination of claims benefits to this Court, then there is reason to expect hundreds, if not thousands, of claimants would do so. Even claimants who do receive benefits would have reason to ask this Court to award them more benefits.[15] If their appeal to this court was

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[15] This would be especially true of the roughly 2,500 claimants seeking

unsuccessful, any claimant could then pursue further appeals. The entire point of the Settlement Agreement was to resolve the thousands of cases filed in federal and state courts. Kane's interpretation of the "special master" provision of the Settlement Agreement would allow all of those cases to be litigated by the undersigned, after all.

In sum: (1) the Special Master appointed by counsel pursuant to the Settlement Agreement was not appointed by the Court pursuant to Rule 53; and (2) the Special Master's determinations are not appealable to this Court under Rule 53 or the Settlement Agreement. Accordingly, Kane's argument that this Court has the authority to review the Special Master's conclusion for an abuse of discretion is not well-taken.

C. Appeal from or Relief from Entry of the Settlement Agreement

A number of claimants cast their requests that this Court review the Special Master's determinations as "appeals" from the Court's judgment, now nearly two years old, approving the Settlement Agreement, or as motions for relief from that judgment. The essence of these requests is that the Court should re-write certain provisions contained in the Settlement Agreement, or should suspend them in a particular case, because they are unfair as applied to the claimants' particular circumstances. These procedural tactics of attacking the Court's judgment approving the Settlement Agreement, however, are unavailing. That these strategms are not allowed under the Federal Rules of Civil Procedure is revealed by examining the history of the Court's entry of judgment.

On March 14, 2002, the Court docketed the then-proposed Final Settlement Agreement, thereby making in available to any attorney with internet access. See docket no. 237. The proposed agreement was also posted at www.sulzerimplantsettlement.com. On March 20, 2002, the Court approved the plans submitted by plaintiffs' class counsel for giving formal notice of this proposed settlement to the

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awards of extraordinary injury benefits, which are more discretionary.

entire class. Docket nos. 216, 243, 244.[16] In addition to this formal notice, the proposed settlement agreement was extremely well publicized by the legal, financial, and popular press. Also, plaintiffs' class counsel conducted numerous seminars and teleconferences around the country, to answer questions from individual plaintiff's counsel about the specific terms of the deal. As a result of all of these outlets, the plaintiff class and their attorneys were generally well aware of the existence and details of the Settlement Agreement. Before the Court held its final fairness hearing on May 6 and 7, 2002, the plaintiffs and their counsel had over 50 days to examine and digest the Settlement Agreement, and to object to any portions of it they thought unfair.

As noted above, the Court received only 30 or so objections to the fairness of the parties' final settlement agreement, and all but seven objections were withdrawn before the final fairness hearing. These are remarkably low numbers. The Court then took an active role at the fairness hearing, questioning counsel and witnesses about all aspects of their Agreement, including even those aspects addressed by objections that had been withdrawn. The Court concluded that the Settlement Agreement represented "the best opportunity for the most people to recover the most money the soonest." Order at 2-3 (docket no. 340). The Court further concluded that:

- the class (and subclasses) identified in the Fifth Amended and Consolidated Class Action Complaint,

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[16] The Court-approved plan for giving notice to the plaintiff class included: (i) advertising in the two largest national daily newspapers; (ii) Internet advertising on sites accessed by the general population, including people who met the definition of the class; (iii) media outreach through the press, including a television video news release, a written radio news release, and a nationally-issued press release; (iv) a mailing to orthopedic surgeons nationwide; (v) notification to all Sulzer sales representatives; (vi) a mailing to hospitals to which the Inter-Op shell and/or Natural Knee tibial baseplate implants were shipped; (vii) paid advertising in daily regional newspapers in locations where 20 or more implants occurred; and (viii) direct mailing to all known Class Members. The plan of notice also incorporated a toll-free 800 number and a web site where class members could obtain information on the settlement. See docket no. 216.

> and also in the Settlement Agreement, satisfies the requirements of Fed. R. Civ. P. 23(a), as well as Fed. R. Civ. P. 23(b)(2) and (b)(3); and
>
> - the Notice that was sent to the Class was the best practicable under the circumstances, and satisfies the requirements of Fed. R. Civ. P. 23(c)(2) & (e); and
> - the proposed settlement was reached after extensive arms-length negotiations and is premised upon substantial inquiry into and discovery relating to all legal and factual issues relevant to the propriety of the proposed Settlement Agreement; and
> - the proposed Settlement Agreement is fair, adequate, and reasonable, and meets the requirements of Fed. R. Civ. P. 23(e).
>
> Indeed, the Court finds that the sizeable and detailed record complied by the parties compels the conclusion that this settlement represents an eminently fair and reasonable resolution for the entire Plaintiff Class.

Order at 3-4 (docket no. 340). Accordingly, the Court granted final approval to the Settlement Agreement on May 8, 2002. After the Settlement Agreement became irrevocable, the Court entered an Order on June 4, 2002, confirming its May 8, 2002 Order and dismissing all settled claims with prejudice. See docket no. 353.

The procedural importance of the May 8 and June 4, 2002 Orders cannot be over-emphasized. As of May 8, 2002, the Court approved the Settlement Agreement, and all the terms it contained. If a plaintiff did not like any of these terms, it was easy for the plaintiff to opt out of participation in the Agreement. Any class member who did not opt out of the Settlement Agreement, however, became bound by its terms. Moreover, the Court took pains to make clear that, if a plaintiff wanted to challenge the Court's conclusion about the fairness of the Settlement Agreement, the time for appeal began to run on June 4, 2002. The June 4 Order explicitly stated: "This judgment is entered pursuant to Fed. R. Civ. P. 58, and is a

final appealable Order." Order at 2. Nobody filed any notice of appeal. As the Court has stated repeatedly since then, "there is no question but that the Court's June 4, 2002 Judgment Order, giving official approval to all of the terms and conditions contained the parties' Settlement Agreement, was final." Order at 3 (Mar. 21, 2003) (docket no. 610); Order at 17-18 (June 12, 2003) (docket no. 738); Order at 2 (Nov. 5, 2003) (docket no. 1280).

When the Court reviewed the Settlement Agreement to determine whether it was "fair, reasonable, and adequate" under Rule 23(e)(1)(C), the Court had only certain options available to it: the Court "could have accepted the proposed settlement; it could have rejected the proposal and postponed the trial to see if a different settlement could be achieved; or it could have decided to try the case." Evans v. Jeff D., 475 U.S. 717, 727 (1986). The Court could not choose to accept only parts of the settlement, and reject other parts. The Court could not, for example, conclude that a given position of the Settlement Agreement was insufficiently fair; and Order the parties to re-write or negotiate that provision. "It is the settlement taken as a whole, rather than the individual component parts, that must be examined for overall fairness. Neither the district court nor [a reviewing] court have the ability to 'delete, modify or substitute certain provisions.' The settlement must stand or fall in its entirety." Hanlon v. Chrysler Corp.; 150 F.3d 1011, 1026 (9th Cir. 1998) (citations omitted).

Now, however, many claimants ask the Court to do what the law expressly says it may not do – "delete, modify or substitute certain provisions" contained in the Settlement Agreement, because those provisions are in some way "unfair" as applied to them. Further, these claimants ask the Court to re-examine the fairness of the Settlement Agreement almost two years after the Court entered final judgment concluding it was fair, and approving all of its terms. These claimants make their requests despite having had ample opportunity, before the final fairness hearing, to examine the Settlement Agreement

and object to its terms.

There were three mechanisms available to a plantiff who disagreed with the Court's conclusion that the Final Settlement was fair. First, a plaintiff could opt out. Obviously, none of the claimants now seeking to challenge the Special Master's determinations by seeking this Court's review chose to opt out of participation in the Settlement Agreement. Second, a plaintiff could move the Court to "reconsider" its conclusion that the Settlement Agreement was fair, by filing a post-judgment motion to alter or amend judgment, pursuant to Rule 59, or a motion for relief from judgment, pursuant to Rule 60. See Feathers v. Chevron, U.S.A., Inc., 141 F.3d 264, 268 (6th Cir. 1998). Given that Rule 59 motion must be filed within 10 days after entry of judgment, any requests by claimants for "reconsideration" must be deemed Rule 60 motions, carrying a "significantly higher" standard for relief. Id. In any event, none of the claimants assert any of the grounds listed in Rule 60(b) as a basis for re-examining the entire settlement for "overall fairness." Hanlon, 150 F.3d at 1026. At best, claimants assert that a specific provision of the Settlement Agreement is not fair as applied to them. And third, a plaintiff could challenge the Court's conclusion that the Settlement Agreement is fair by taking an appeal from the Court's June 4, 2002 judgment. But the time within which an appeal from that judgment properly could be taken has long since run.

In sum, the plaintiffs' determination of their requests for review, by this Court, of the decisions of the Claims Administrator and Special Master, as "appeals" or "motions for reconsideration" or "motions for relief," are all invalid. The entry of a final benefits determination, pursuant to the claims administration process, did not revive any plaintiffs' right to challenge the Court's June 4, 2002 judgment. The Court remains of the opinion that the parties' Settlement Agreement in this case meets all of the requirements of Rule 23, and claimants cannot use a late challenge to this conclusion to obtain the Court's review of their final benefits determinations.

III. Conclusion

After the Court concluded that the class action Settlement Agreement in this case was fair, adequate, and reasonable, any given class member could choose to participate in the Settlement Agreement, or instead opt out. A plaintiff's choice to participate in the Settlement Agreement was a choice to accede to all of the terms the Agreement contained, including acceptance of a determination of benefits through a defined, extrajudicial claims administration process.

Requests by plaintiffs that this Court should suspend or modify certain aspects of the claims administration process are not well-taken, whether denominated an "objection to", "appeal of," "motion for relief from," or "motion to amend" the Special Master's final decision. The same is true of documents styled as motions to "enforce," "amend," or otherwise obtain "relief from" the Settlement Agreement. The Special Master's "final and binding determination" of benefits is precisely that.

Finally, although the point is not raised directly in Kane's or any of the other claimants' requests that the Court review or overturn the Special Master's determination, it cannot be ignored that many of these claimants have other sources of remuneration. As discussed above, it appears that the Claims Administrator and Special Master denied benefits to many claimants because their attorneys failed to comply with important, well-published deadlines. Those claimants may have grounds to seek redress from their attorneys – which explains, in part, why so many of these attorneys have sought from this Court yet another level of review. The settlement trust created by the parties, however, was designed only to pay for valid claims made "in accordance with th[e] Settlement Agreement." Settlement Agreement §2.5(d). While the Court has some sympathy for the plight of overworked counsel, the fact remains that the Settlement Trust was not meant to be used, and should not be used, to protect attorneys against their failure to comply with the terms their clients agreed to.

For all the reasons stated in this opinion, plaintiff

Kane's motion to enforce the Settlement Agreement is overruled.

IT IS SO ORDERED.

s/Kathleen M. O'Malley
KATHLEEN McDONALD O'MALLEY
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 1:01-CV-9000

IN RE: SULZER
HIP PROSTHESIS
AND KNEE PROSTHESIS
LIABILITY LITIGATION

(MDL Docket No. 1401)
JUDGE O'MALLEY
MEMORANDUM AND ORDER
DATE OF ENTRY: February 23, 2004

On February 6, 2004, the Court entered an Order denying class-member CeCee Kane's motion to enforce the terms of the class-action settlement agreement in this case. See docket no. 1714 ("Kane Order"). As the Court explained at length in the Kane Order, the attempts by Kane and other class members to obtain judicial review of the benefits decisions of the Claims Administrator and Special Master are neither allowed nor appropriate. This is true whether the attempt is made by filing a document denominated as: (1) an "appeal" to this Court of the Claims Administrator's and/or Special Master's final decision (e.g., docket no. 1059); (2) "objections" to the Claims Administrator's and/or Special Master's final decision (e.g., docket no 1257); (3) a "motion for relief" from the Claims Administrator's and/or Special Master's final decision (e.g., docket no. 1667); (4) a motion to amend the Claims Administrator's Procedures (e.g., docket no. 970); (5) a motion to enforce the Settlement Agreement (e.g., Kane's motion, docket no. 1179); (6) a letter asking the Court to direct the Claims Administrator or Special Master to reconsider; or (7) an appeal to the Sixth Circuit Court of Appeals (e.g., docket no. 1617).

Accordingly, the Court hereby **DENIES** and **OVERRULES**

all of the documents listed below, for the same reasons the Court denied Kane's motion. The Court hereby incorporates by reference the reasoning and the result set out in the Kane Order.

The documents filed at the following docket numbers are denied and overruled:

823	1059	1256	1342	1623
899	1076	1257	1390	1624
970	1094	1258	1399	1626
980	1163	1259	1441	1667
981	1179	1260	1470	1730
988	1180	1279	1617	1740
994	1254	1293	1621	1803
1017	1255	1315	1622	

IT IS SO ORDERED.

s/Kathleen M. O'Malley
KATHLEEN McDONALD O'MALLEY
UNITED STATES DISTRICT JUDGE